180 (2)

Supreme Court, U.S.
FILED

No. 10-952

JAN 21 2011

OFFICE OF THE CLERK

In the

Supreme Court of the United States

BLUE MOVIES, INC. D/B/A/ LOVE BOUTIQUE, ET AL.,
Petitioners,

v.

LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

VOLUME 2 OF APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX G

JEFFERSON CIRCUIT COURT
DIVISION SIX (6)

NO. 02-CI-06086
HON. STEPHEN RYAN

[Filed December 3, 2003]

TAYLOR BOULEVARD THEATRE, INC., d/b/a *Deja Vu* and *Erotic Touch*, a Kentucky Corporation, BLUE MOVIES, INC., d/b/a *Love Boutique*, a Kentucky Corporation, and WIN, PLACE & SHOW BAR, INC., d/b/a *Win, Place & Show Bar*, a Kentucky Corporation	)
Intervening Plaintiffs	)
v.	)
LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT	)
Defendant	)

INTERVENING PLAINTIFFS' VERIFIED COMPLAINT FOR DECLARATORY RELIEF, RESTRAINING ORDER, PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, DAMAGES, AND ATTORNEY FEES

COME NOW the Intervening Plaintiffs, Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu* and *Erotic Touch*, Blue Movies, Inc., d/b/a *Love Boutique*, and Win, Place & Show Bar, Inc., d/b/a *Win, Place & Show Bar* (who are all collectively referred to here as the "Intervening Plaintiffs"), by and through their attorneys, and for their claims for relief against the Defendant, state as follows:

INTRODUCTION

1. This is a civil action wherein Intervening Plaintiffs pray for a declaratory judgment, damages, a temporary restraining order, and both a preliminary injunction and permanent injunction to restrain and enjoin the Defendant, as well as its agents, employees and representatives, from acting under color of state law to deprive the Intervening Plaintiffs of their rights, privileges and immunities secured to them by the Constitutions of the United States and the State of Kentucky. Specifically, Intervening Plaintiffs seek to have this Court declare as unconstitutional both on its face and as applied, and to enjoin, Section 111.18 of Chapter 111 of the Louisville/Jefferson County Metro Government Code of Ordinances as recently amended by the Legislative Council of the Louisville/Jefferson County Metro Government on November 25, 2003 (hereinafter

"Section 111.18," or simply the "Ordinance"). A copy of the draft Ordinance amending Section 111.18 is attached hereto as Ex. A, and a copy of Chapter 111, which provides the definitions relevant to the Ordinance as well as the previous version of Section 111.18 is attached hereto as Ex. B; both being incorporated herein by reference.

JURISDICTION

2. This Court has jurisdiction and power to grant the injunctive relief requested pursuant to C.R. 64.04.

3. This Court has the jurisdiction and authority to grant the temporary restraining order prayed for here pursuant to CR 65.03.

4. This Court has the jurisdiction and authority to grant the declaratory relief prayed for here pursuant to CR 57.

5. Jurisdiction to adjudicate the Intervening Plaintiffs' federal constitutional claims is conferred pursuant to 42 U.S.C. §1983.

6. Authority for Intervening Plaintiffs' request for attorney's fees and costs is conferred by 42 U.S.C. §1988.

7. No other action, civil or criminal, is pending in any state court involving the Intervening Plaintiffs regarding the activities and events at issue here.

8. Venue resides in this Court and is proper and appropriate as the various acts complained of occurred, and the Defendant is located within, the County of Jefferson, Kentucky.

PARTIES

9. Intervening Plaintiff, Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu* and *Erotic Touch,* is a corporation duly organized under the laws of the State of Kentucky since 1981, and is authorized and qualified to do business in the State of Kentucky. It leases and occupies the building located at 3421 and 3423 Taylor Boulevard, in Louisville, Kentucky, and operates thereon two businesses known as "*Deja Vu*" and "*Erotic Touch*." *Deja Vu* is a cabaret style nightclub that features live, non-obscene, clothed, semi-nude, and nude performance dance entertainment presented to the consenting adult public. This performance dance entertainment constitutes speech and expression protected by the First and Fourteenth Amendments to the United States Constitution and Sections 1, 2, 4, and 8 of the Kentucky Constitution. *Erotic Touch* is a retail establishment that presents, sells, and rents to the consenting adult public a variety of non-obscene but sexually explicit expressive materials, such as films, videos, books and magazines. These materials constitute speech and expression protected by the First and Fourteenth Amendments to the United States Constitution and Sections 1, 2, 4, and 8 of the Kentucky Constitution.

10. *Deja Vu* has been open for business at 3421 Taylor Blvd., in its current form since 1999, and currently operates from 11:00 a.m. to 2:00 a.m. Monday through Thursday, from 11:00 a.m. to 4:00 a.m. on Fridays and Saturdays, and from 4:00 p.m. to 2:00 a.m. on Sundays. Prior to 1999, *Deja Vu* operated a retail establishment that presented, sold, and rented to the consenting adult public a variety of non-obscene but sexually explicit expressive materials. Such a retail "adult" facility has operated on these premises since 1970.

11. *Erotic Touch* operates at 3423 Taylor Blvd., from 9:00 a.m. to 2:00 a.m. Monday through Thursday, from 11:00 a.m. to 4:00 a.m. on Fridays and Saturdays, and from 1:00 p.m. to 2:00 a.m. on Sundays.

12. Intervening Plaintiff, Blue Movies, Inc., d/b/a *Love Boutique* ("*Blue Movies*"), is a corporation duly organized under the laws of the State of Kentucky since 1982, and is authorized and qualified to do business in the State of Kentucky. It leases and occupies the building located at 140 West Jefferson, in Louisville, Kentucky, and operates thereon a business known as the "Love Boutique." The *Love Boutique* is a retail establishment that presents, sells, and rents to the consenting adult public a variety of non-obscene but sexually explicit expressive materials, such as films, videos, books and magazines. These materials constitute speech and expression protected by the First and Fourteenth Amendments to the

United States Constitution and Sections 1, 2, 4, and 8 of the Kentucky Constitution.

13. *Blue Movies* has operated at 140 West Jefferson only since May, 2003, and previously operated its establishment at 244 West Jefferson, in the City of Louisville. *Blue Movies* has been in operation in the City of Louisville for thirty-one years, and was recently required to move to the 140 West Jefferson site as a result of an eminent domain action brought by the Louisville/Jefferson County Metro Government in regard to the property that *Blue Movies* was leasing at 244 West Jefferson. As a result of that eminent domain action, *Blue Movies* has recently, this year, expended in excess of $400,000.00 in renovation and improvements at the 140 West Jefferson location in order for it to be able to operate its retail establishment at that address. *Blue Movies* operates, and has operated in the past, twenty-four hours a day, seven days a week.

14. Intervening Plaintiff, Win, Place & Show Bar, Inc., d/b/a *Win, Place & Show Bar*, is a corporation duly organized under the laws of the State of Kentucky since 1999, and is authorized and qualified to do business in the State of Kentucky. It leases and occupies the building located at 3425 Taylor Boulevard, in Louisville, Kentucky, and operates thereon a business known as "*Win, Place & Show Bar*" (hereinafter "*Win, Place & Show*"). *Win, Place & Show* is a cabaret style nightclub that features live, non obscene performance dance entertainment presented to the consenting

adult public where entertainers perform at times clothed, at other times "topless," and still at other times fully nude. This performance dance entertainment constitutes speech and expression protected by the First and Fourteenth Amendments to the United States Constitution and Sections 1, 2, 4, and 8 of the Kentucky Constitution. *Win, Place & Show* possesses a liquor license to sell alcoholic beverages on the premises, and a specific license to sell such beverages and to remain open until 4:00 a.m.

15. *Win, Place & Show* has operated at 3425 Taylor Boulevard since 1999, and its current hours of operation are from 12:00 p.m. to 2:00 a.m. Monday through Thursday, and from 12:00 p.m. to 4:00 a.m. on Fridays and Saturdays.

16. In the past, Taylor Boulevard Theatre, Inc. and *Blue Movies* have been licensed by the City of Louisville pursuant to its "adult" business licensing and regulatory ordinance. The licenses have never been suspended or revoked, but have recently not been formally renewed as a result of various litigation and injunctions entered both in the federal and state courts.

17. Defendant, Louisville/Jefferson County Metro Government (sometimes simply "Metro"), is a political subdivision within the State of Kentucky, and is authorized to enact laws within the area of the County of Jefferson, and which has enacted, through the actions of its Legislative Council (sometimes simply "Council"), the Ordinance challenged hereby.

Upon information and belief, Metro is and will be taking the position that the Intervening Plaintiffs, and each and every one of them, will be subject to, and will be required to comply with, Section 111.18 of the Louisville/Jefferson County Metro Government Code of Ordinances, as recently amended.

18. Because the Ordinance is fatally overbroad, and because many of the Intervening Plaintiffs' entertainers and customers would not have the interest and/or financial wherewithal to seek legal redress in regard to the violation of their own constitutional rights, Intervening Plaintiffs have standing to assert not only their own rights in this action, but the rights of all of their employees, entertainers, future entertainers, and customers as well, and are permitted to facially challenge the Ordinance.

FACTUAL ALLEGATIONS

19. Intervening Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

20. Section 111.02 of the Louisville/Jefferson County Code of Ordinances defines "Adult Entertainment Activity" or "Activities" or "Adult Entertainment Establishment" as one or more of the following defined activities:

> "(1) ADULT AMUSEMENT ARCADE. An establishment having as one of its principal uses one or more of the following: customer-operated motion

picture devices, peep shows, viewing areas and/or similar devices either coin, token or slug operated or which, in consideration of an entrance fee, display matter distinguished or characterized by an emphasis on depictions of sexual activities, as hereinafter defined, or which other male or female persons expose to the view of the customer the bare female breast below a point immediately above the top of the areola, human genitals, pubic region or buttocks, even if partially or completely covered by translucent material, or human or simulated male genitals a discernibly turgid state, even if completely or opaquely covered.

(2) ADULT BOOK STORE. An establishment having as one of its principal uses the sale, rent or display of pictures, books, periodicals, magazines, appliances and similar material which are distinguished or characterized by their emphasis or depictions of sexual activities.

(3) ADULT ENTERTAINMENT PROVIDER. A commercial establishment, such as a hotel or motel, which in addition to its primary business purpose of providing services unrelated to depictions of sexual activities, makes entertainment (either live or on film or other video recordings) available to its customers and such entertainment has

as a dominant theme or is characterized or distinguished by an emphasis on matter depicting, describing or relating to sexual activities, if such establishment advertises the availability of such adult entertainment at its establishment. The advertisement of such materials shall not include the posting of a card or handbill on or near a television set in a hotel or motel room advising room guests that such adult motion picture and/or films are available upon request of the guest, or advertising informing the public of the availability of commercial cable channels.

(4) ADULT MOTION PICTURE THEATER. An establishment having as one of its principal uses the presentation of motion pictures, slide projections and other similar material having as a dominant theme or characterized or distinguished by an emphasis on matter depicting, describing or relating to sexual activities, as hereinafter defined, for observation by persons therein.

(5) ADULT STAGE SHOW THEATER. An establishment having as one of its principal uses the presentation of live performances of humans or animals having as a dominant theme or characterized or distinguished by an emphasis on matter depicting, describing or relating to sexual activities for observation by persons therein.

(6) ADULT VIDEO CASSETTE RENTAL CENTER. A commercial establishment which has as one of its principal business uses the rental or sale of video cassettes or other video recordings which depict material distinguished or characterized by an emphasis on depictions of sexual activities.

(7) CABARET. An establishment which features as one of its principal uses, entertainers and/or waiters and/or bartenders, male or female impersonators and/or persons, either male or female, who expose anytime to public view of the patrons of the establishment the bare female breast below a point immediately above the top of the areola, human genitals, pubic region or buttocks, even if partially or completely covered by translucent material, and/or human or simulated male genitals in a discernibly turgid state, even if completely and opaquely covered.

(8) COMMERCIAL SEXUAL ENTERTAINMENT CENTER. Any commercial establishment not otherwise described herein which as one of its principal uses make available matter, services or entertainment appealing to adult sexual interests if the establishment or its entertainment, services or goods are advertised by or on behalf of the establishment in a manner patently

designed to appeal to such adult sexual interests.

(9) MASSAGE PARLOR. An establishment for treating the human body by rubbing, stroking, kneading, tapping or similar treatment with the hand or any other part of the human body which promotes its services in a manner designed to appeal to the patron's sexual interest.

(10) SELF-DESIGNATED ADULT ENTERTAINMENT CENTER. Any establishment which designates all or a portion of its premises as for adults only and has a policy of excluding minors from its premises or from a portion of its premises or which advertises so as to convey the impression that the services, entertainment, matter or goods available at the premises or at the portion of the premises designated for adults only are characterized or distinguished by depictions of sexual activities."

21. Section 111.02 of the Louisville/Jefferson County Code of Ordinances defines "Sexual Activities" as:

"Partial or complete male and/or female nudity in conjunction with:

(1) Depiction of human genitals in a state of sexual stimulation;

(2) Acts of human masturbation, sexual intercourse or sodomy; or

(3) Holding or other erotic touching of human genitals, pubic region, buttocks or breasts."

22. Section 111.36(A) of the Louisville/Jefferson County Code of Ordinances requires that "[t]he owner or operator of an establishment intending to engage, or engaging under a previously issued licence in an adult entertainment activity shall make application for a license with the Director in accordance with this ordinance."

23. Section 111.18 of the Louisville/Jefferson County Code of Ordinances previously provided that "[a]n establishment licensed to engage in adult entertainment shall not permit any person to conduct, show, state or perform any entertainment, whether live or on film, video tape, or other video recording or to perform massage between the hours of 2:00 a.m. and 8:00 a.m."

24. On November 25, 2003, the Legislative Council of the Louisville/Jefferson County Metro Government enacted the Ordinance which repealed, amended and reenacted §111.18 to read that "[a]n adult entertainment establishment, as defined in Section 111.02, shall not operate or offer adult entertainment activity or materials between the hours of 1:00 a.m. and 11:00 a.m. Monday through Saturday, nor on Sunday between the hours of 1:00 a.m.

and 1:00 p.m." For whatever reason, this Ordinance was enacted on an emergency basis in that it is to "take effect upon its passage and approval."

25. *Deja Vu* estimates that it would suffer a 26% reduction in gross revenues, a 23% reduction in customers viewing protected entertainment, and a 27% reduction in the number of entertainment performances conducted on its premises as a result of compliance with the Ordinance.

26. *Erotic Touch* estimates that it would suffer a 20% reduction in gross revenues, which represents directly a reduction in the sale and rental of expressive materials, as a result of compliance with the Ordinance.

27. *Blue Movies* estimates that it would suffer a 30% reduction in gross revenues, which represents directly a reduction in the sale and rental of expressive materials, as a result of compliance with the Ordinance.

28. *Win, Place & Show* estimates that it would suffer a 35% reduction in gross revenues, in customers viewing protected entertainment, and entertainment performances conducted on its premises as a result of compliance with the Ordinance.

UNCONSTITUTIONALITY OF THE ORDINANCE

29. Intervening Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

30. The Ordinance is unconstitutional, both facially and as applied, and is in violation of Intervening Plaintiffs' First, Fifth, Ninth, and Fourteenth Amendment rights under the United States Constitution and their corollary rights under the Kentucky Constitution for, among others, the following reasons:

(a) It was not lawfully enacted;

(b) It acts not as a content neutral law of general applicability, but rather, as an impermissible prior restraint on constitutionally protected activities, contrary to the First and Fourteenth Amendments to the United States Constitution and the corollary provisions of the Kentucky Constitution;

(c) It is an impermissible content-based restriction in violation of the First and Fourteenth Amendments;

(d) It is overbroad in its application to constitutionally protected activities, and violates **Renton v. Playtime Theatres,** 475 U.S. 41 (1986) in that it fails to offer a reasonable opportunity to open and operate an "adult" entertainment business in Jefferson County;

(e) It violates Intervening Plaintiffs' constitutional rights to free speech and expression in that it is overbroad and is not narrowly tailored in its restrictions contrary to the First and Fourteenth Amendments to the United States Constitution, and further violates Intervening Plaintiffs' fourteenth Amendment rights to engage in a lawful occupation and attempt to impose "unconstitutional conditions" upon persons seeking to engage in constitutionally protected activities, which in an of itself is a violation of the First and Fourteenth Amendments of the United States Constitution;

(f) It violates the First and Fourteenth Amendments to the United States Constitution in that the restrictions on protected speech and expression are not necessary to a compelling governmental interest, and they are not the least restrictive means available to accomplishing any asserted governmental goal.

(g) It violates the First and Fourteenth Amendments to the United States Constitution in that the restrictions on protected speech and expression do not further a substantial governmental interest, they are not narrowly tailored to directly advance any such interest in that the restrictions upon protected expression are greater than is essential to further a permissible governmental

interest, and they are not supported by any competent evidence establishing that such restrictions would be effective in furthering any substantial governmental interest. In addition the restrictions are not within the government's power to enact;

(h) It violates Intervening Plaintiffs' equal protection rights under the Fourteenth Amendment in that it unconstitutionally discriminates against adult businesses and their employees and entertainers based upon the content of speech, and further it creates and permits uneven treatment in the exercise of constitutionally protected rights in the Commonwealth of Kentucky by allowing standards to vary from county to county, city to city, and township to township, and therefore permits differing treatment amongst individuals who desire to engage in constitutionally protected speech;

(i) It violates Intervening Plaintiffs' First Amendments rights under the First Amendment and equal protection and substantive due process rights under the Fourteenth Amendment in that it unconstitutionally discriminates against, among, and between businesses and individuals engaged in substantially similar conduct;

(j) It violates the liberty and occupational liberty interests of the Intervening Plaintiffs and others by impermissibly restricting lawful, and indeed constitutionally protected occupational activities;

(k) It impermissibly singles out First Amendment protected businesses and conduct for discriminatory regulations, and thereby violates the equal protection clause of the Fourteenth Amendment;

(l) Numerous provisions within the Ordinance sections themselves are impermissibly vague, ambiguous and overbroad, including but not limited to various definitions as contained in JCO §111.02;

(m) It constitutes a taking without just compensation in violation of the Fifth and Fourteenth Amendments;

(n) It violates the substantive due process rights of Intervening Plaintiffs and others;

(o) It was not enacted upon a proper basis, nor supported by competent and material evidence;

(p) It unduly, impermissibly, and unconstitutionally restricts the ability of individuals and businesses to engage in

First Amendment protected activities within Jefferson County;

(q) It contains provisions which are overbroad and in violation of the Freedom of Association Clause of the First Amendment and the liberty component of the Due Process Clause of the Fourteenth Amendment;

(r) It violates the Free Exercise and Establishment of Religion Clauses of the First Amendment in violation of **Lemon v. Kurtzman**, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), et al.

(s) It effectuates an impermissible prior restraint upon constitutionally protected speech and expression related activities, contrary to the First and Fourteenth Amendments to the United States Constitution;

(t) It fails to provide for the procedural guarantees required under **Freedman v. Maryland**, 380 U.S. 51 (1965), and **FW/PBS v. Dallas**, 493 U.S. 215 (1990); and,

(u) It places unfettered discretion in the hands of the decisionmaker regarding the granting, denial, revocation, restriction, and/or suspension of a license.

COUNT I - INJUNCTION

31. Intervening Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

32. Any action taken by the Defendant and others to enforce the Ordinance against the Intervening Plaintiffs herein will be taken under color of law and will deprive Intervening Plaintiffs of their constitutional rights as set forth herein, and will cause them irreparable harm for which damages are an inadequate remedy as a matter of law.

33. Intervening Plaintiffs have a substantial likelihood of success on the merits in regard to their constitutional claims; the public interest weighs in favor of preventing deprivation of constitutional rights; and any balancing of harms between the parties weighs in favor of the Intervening Plaintiffs and against the Defendant in any attempt to enforce a clearly and hopelessly flawed unconstitutional Ordinance. Accordingly, temporary, preliminary, and permanent injunctive relief is warranted here to enjoin enforcement of the Ordinance.

34. For the reasons set forth above and to preclude Intervening Plaintiffs and others from being denied their rights under the United States Constitution and their corollary rights under the Kentucky Constitution, this Court should enter an order enjoining, temporarily, preliminarily and permanently, Defendant, its

employees, agents, and representatives, as well as all others who receive actual or constructive notice of the decision of this Court, from enforcing the Ordinance against the Intervening Plaintiffs and indeed anywhere in the City of Louisville, and the County of Jefferson, Kentucky.

COUNT II - DECLARATORY RELIEF

35. Intervening Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

36. This Court has the authority to declare the rights and other relations of the Intervening Plaintiffs and of the Defendant, and should do so here.

37. Because of the questioned constitutionality of the Ordinance and its enforcement against Intervening Plaintiffs, Intervening Plaintiffs are entitled to a declaration by this Court in regard to the constitutionality of the respective rights of the parties hereto.

38. This Court should declare, for the reasons set forth above, that the Ordinance is unconstitutional both on its face and as applied to the Intervening Plaintiffs, and is in violation of the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the corollary rights under the Kentucky Constitution.

COUNT III - DAMAGES

39. Intervening Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

40. Pursuant to 42 U.S.C. §1983 and common law, Intervening Plaintiffs are entitled to damages for deprivations to their constitutional rights.

41. Pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and the corollary provisions as contained in the Constitution of the State of Kentucky, Intervening Plaintiffs are entitled to "just compensation" for governmental "takings," whether total or partial, of both their property and property rights.

42. The hours of operation provisions contained in Section 111.18 of Chapter 111 constitute governmental "takings" within the purview of the Fifth and Fourteenth Amendments to the United States Constitution and the corollary protections afforded by the Constitution of the State of Kentucky. These regulatory "takings," to the extent that they do not render the Ordinance unconstitutional in-and-of-itself, entitle Intervening Plaintiffs to "just compensation" for the deprivations of their property and property rights, which has not been paid by Defendant to the Intervening Plaintiffs.

43. As a direct and proximate result of the enactment of the Ordinance and its

unconstitutional application and enforcement by the Defendant against the Intervening Plaintiffs, Intervening Plaintiffs have incurred and suffered significant and substantial damages, and will in the future suffer significant and substantial damages, including but not limited to loss of constitutional rights, loss of earnings, lost business profits, loss of business reputation, and having to incur costs and attorney fees in seeking protection of their constitutional rights asserted herein. Pursuant to 42 U.S.C. §1983 and common law, Intervening Plaintiffs are therefore entitled to damages for the deprivations of their constitutional rights as well as the monetary losses incurred.

44. Intervening Plaintiffs are entitled to a judgment of damages and just compensation in amounts to which they are found to be entitled at trial.

COUNT IV - ATTORNEYS FEES

45. Intervening Plaintiffs incorporate herein by reference each and every paragraph above as though fully set forth herein.

46. Because Section 111.18 of Chapter 111, as amended, is unconstitutional on its face and as applied to the Intervening Plaintiffs, and because it would deprive the Intervening Plaintiffs and others of their fundamental federal constitutional rights, Intervening Plaintiffs, as prevailing parties in the aforementioned matter, are entitled to recover actual attorney fees and costs pursuant to 42

U.S.C.1988 in seeking to have the aforementioned Ordinance declared unconstitutional and enjoined thereby.

RELIEF REQUESTED

WHEREFORE, Intervening Plaintiffs request this Honorable Court to enter an order and/or judgment in their favor and against Defendant as follows:

A. Declaring Section 111.18 of Chapter 111 of the Louisville /Jefferson County Metro Government Code of Ordinances, as recently amended, to be unconstitutional, both facially and as applied to Intervening Plaintiffs herein, and to be in violation of the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and the corollary provisions of the Kentucky Constitution;

B. Entering a temporary restraining order enjoining the Defendant, as well as its officers, agents, employees and representatives and all other persons acting through or for them, from enforcing or implementing Section 111.18 of Chapter 111 of the Louisville /Jefferson County Metro Government Code of Ordinances, as recently amended;

C. Entering both a preliminary and permanent injunction, enjoining the Defendant, as well as its officers, agents, employees and representatives and all other persons acting through or for them, from enforcing or

implementing Section 111.18 of Chapter 111 of the Louisville /Jefferson County Metro Government Code of Ordinances, as recently amended;

D. Awarding damages and "just compensation" to the Intervening Plaintiffs in amounts to which they are found to be entitled at trial;

E. Awarding Intervening Plaintiffs their reasonable attorney fees and costs incurred herein pursuant to 42 U.S.C.1988; and

F. Entering such other and further relief in law and in equity that this Court deems just and proper in the circumstances.

Dated: December _____, 2003

Respectfully submitted,

/s/ Frank Mascagni
Paul Gold
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VERIFICATION OF ROBERT HOLLIS

I, Robert Hollis, being a corporate representative of Taylor Boulevard Theatre, Inc., Blue Movies, Inc., and Win, Place & Show Bar, Inc., do hereby certify under penalty of perjury that the facts as set forth in the Intervening Plaintiffs' Verified Complaint for Declaratory Relief, Restraining Order, Preliminary Injunction, Permanent Injunction, Damages, and Attorney Fees, are true and correct the best of my knowledge, except in regard to matters assert upon information and belief.

STATE OF Kentucky)
)§§
COUNTY OF Jefferson)

Subscribed, sworn to and acknowledged before me by Robert Hollis, this 3rd day of Dec., 2003, to be his free act and deed.

/s/ Marcella L. Goodin
Notary Public, State at Large

My Commission Expires: 6/30/04

Plaintiff's address:

APPENDIX H

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

APPEAL NO.'s: 2005-CA-90-MR;
2005-CA-92-MR; 2005-CA-113-MR

RELATED APPEALS
2005-CA-85-MR; 2005-CA-91-MR;
2005-CA-100-MR; 2005-CA-176-MR

[Filed March 3, 2006]

KENTUCKY RESTAURANT CONCEPTS, INC. d/b/a PT'S SHOW CLUB, BLUE MOVIES, INC., d/b/a LOVE BOUTIQUE, *et al.*,	)
Plaintiffs-Appellants/Cross-Appellees,	)
v.	)
LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT,	)
Defendant-Appellee/Cross-Appellant.	)

Appeal from the Jefferson Circuit Court
Action No. 04-CI-01967

BRIEF OF APPELLANTS/CROSS-APPELLEES (APPENDICES "A" - "P")

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**Pending Admission Pro Hac Vice*

CERTIFICATE OF REQUIRED BY CR 76.12(6)

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by U.S. Mail Registered with postage prepaid on March 3, 2006: Hon. Judge Stephen P. Ryan, 700 W. Jefferson St., Louisville, KY 40202; Hon. N. Scott Lilly, Hon. Winston King, and Hon. William O'Brien, 531 Court Place, Ste. 1001, Louisville, KY 40202; Hon. E. Patrick Mulvihill, 3226 Bremer Way, Louisville, KY 40213; Hon. Gregory Stumbo, 1024 Capitol Center Dr., Frankfort, KY 40601; Hon. Scott Bergthold, 8052 Standifer Gap Road, Suite C, Chattanooga, TN 37421. The undersigned does also certify that the record on appeal was not withdrawn from the Jefferson Circuit Court.

/s/ Frank Mascagni III
Frank Mascagni III

INTRODUCTION

Plaintiffs appeal from a circuit court's ruling on a challenge brought under the Kentucky Constitution against a Louisville/Jefferson County Metro Government ordinance that provides for the licensing and regulation of "adult entertainment establishments," where the ruling: 1) vacated a previously entered restraining order; 2) denied Plaintiffs' motion for a temporary injunction; and 3) with two small exceptions, granted the Defendant's motion for summary judgment.

STATEMENT CONCERNING ORAL ARGUMENT

Due to the importance of the constitutional claims at issue in this case, many of which involve matters of first impression related to the interpretation of provisions of the Kentucky Constitution, Plaintiffs respectfully request that oral arguments be heard. Oral argument is particularly warranted because of the inability of the United States Supreme Court to articulate clear and usable standards for the application of analogous provisions of the Federal Constitution in regard to the matters at issue here. Plaintiffs respectfully request 45 minutes to present their arguments in light of: 1) the number and complexity of the constitutional issues that are raised in this action; and 2) the business diversity of Plaintiffs creating certain conflicts of interest among them in regard to the constitutional issues raised here, which will necessitate more than one attorney arguing the positions of the various Plaintiffs.

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STATEMENT OF THE CASE

Plaintiff Kentucky Restaurant Concepts, d/b/a *PT's* ("*PT's*"), operates a liquor-licensed establishment in Louisville which presents to the consenting adult public a variety of female exotic performance dance entertainment where entertainers are at times clothed, at times "topless," and at other times fully nude. *PT's* has been open for business since February, 1997, and it is licensed to remain open and serve alcoholic beverages until 4:00 a.m. Complaint, ¶ 10; Circuit Court Record ("R.") Vol. I, pp. 1-44.

Blue Movies, Inc., d/b/a *Love Boutique ("Blue Movies")*, operates a retail facility in Louisville that presents, sells, and rents to the consenting adult public a variety of non-obscene but sexually explicit expressive materials. *Blue Movies* has operated in Louisville since 1982. Complaint, ¶ 11; R. Vol. I., pp. 1-44.

On March 1, 2004, Defendant Louisville/Jefferson County Metropolitan Government ("Metro") enacted Ordinance No. 21, Series 2004, which amended Chapter 111 of the Metro Government Code of Ordinances ("Chapter 111," or simply the "Ordinance;" a copy of which is found as Apx. B). In general, the Ordinance requires that the "principal owners" or "operators" of defined "adult entertainment establishments" must obtain a license from the Director of Inspection, Permits and Licenses (the "Director") as a condition to operating, and that all employees of such establishments must also obtain a license prior to working in such establishments (§§ 111.36-111.38 and 111.42-111.43); it provides for the denial of license applications and for the

suspension and revocation of licenses for numerous reasons, including the fact that the license (§ 111.43); it requires a $1,000.00 annual licensing fee, presumably for the "principal owners" and "operators," and a $25.00 per year fee for employee licenses (§§ 111.41 and 111.42(B)); it precludes any form of live nude entertainment, or even "topless" dancing, and requires entertainers to wear at all times at least "pasties and g-strings" (§ 111.35(A)); it precludes establishments presenting such clothed dancing from having a liquor license (§ 111.3); it prohibits anyone under the age of eighteen from entering such establishments, even though no true live "adult" entertainment is presented as a result of the nudity prohibitions (§ 111.17); it precludes licensing of individuals convicted of "specified criminal activities," which include, for example, simple drug possession offenses (§§ 111.02; 111.36(B)(2)(b) and (6); 111.38(A)(4); and 111.42(B)); it prohibits such establishments from operating between 1:00 a.m. and 9:00 a.m. on any day (§ 111.18) (referred to as the "hours of operation" restrictions); it prohibits entertainers while "semi-nude" (*i.e.*, while clothed) from receiving any pay or gratuity directly from a patron (§ 111.35(C)), and further requires that such entertainers remain at least six feet away from any patron and perform only on a fixed stage at least eighteen inches above the floor (§ 111.35(B)); and it provides for penalties for violating the Ordinance - - in addition to license suspension and/or revocation - - which can include civil fines between $100.00 to $1,000.00, a misdemeanor conviction (punishable by a fine of not less than $250.00 nor more than $500.00, or imprisonment not to exceed ninety days, or both), and "remedial civil actions" brought by the licensing authorities (§ 111.99).

Plaintiffs filed suit on March 5, 2004, challenging the Ordinance on numerous state constitutional grounds. At the same time, they filed a Motion for Temporary [sic] Restraining Order/Temporary Injunction. The bases of the constitutional attacks against Chapter 111 are set forth in Plaintiffs' complaint (R. Vol. I, pp. 1-44), and the matters at issue in the various motions which resulted in the dismissal of the lawsuit below are found in the Summary and Outline of Constitutional Challenges to Chapter 111. R. Vol. III, pp. 410-30; Apx. C.[1]

At the commencement of litigation and following oral argument on the date of filing, the circuit court entered a restraining order enjoining Metro from enforcing the Ordinance. R.Vol. I, p. 52; Apx. D. The court later clarified that its ruling was actually in the form of a temporary [sic] restraining order. R. Vol. III, pp. 358-61; Apx. H. Plaintiffs' Motion for Temporary Injunction was left pending.[2]

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[1] These various arguments can be discerned in detail from Plaintiffs' Brief in Support of Motion for Temporary Injunction ("Brief"), filed March 5, 2004; Plaintiffs' Response to Motion for Summary Judgment (R. Vol. III, pp. 433-49); and Plaintiffs' Supplemental Brief in Support of Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary [sic] Restraining Order ("Supp. Brief"), filed August 4, 2004.

[2] In June and July of 2004, the other Appellants/Counter-Appellees were granted permission to intervene as plaintiffs. Those businesses fell into two categories. First were Cam I, Inc., d/b/a *Preston Video*; Blue Sky Video, Inc.; Berry Boulevard Entertainment, Inc., d/b/a *The Adult Toy Store*; Pure Pleasure Mega Center, LLC; American Pride VI, Inc., d/b/a Lion's Den Adult Superstore; Taylor Boulevard Theatre, Inc., d/b/a *Erotic*

Metro filed a Motion to Dissolve Temporary [sic] Restraining Order/Temporary Injunction (R. Vol. I, pp. 76-89) while the case was in federal court (after Metro had filed a notice of removal but before the federal district court entered an order of remand), and then later filed a motion for summary judgment. R. Vol. II, pp. 148-241. The motion to dissolve was later "passed to the trial date." (Order, R. Vol. III, pp. 347-50; Apx. G). Pending before the circuit court were therefore: 1) Plaintiffs' Motion for Temporary Injunction; 2) Metro's Motion to Dissolve Temporary [sic] Restraining Order/Temporary Injunction; and 3) Metro's Motion for Summary Judgment.

On December 14, 2004, the circuit court entered a final and appealable judgment dissolving the

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Touch; and TBC, Inc., d/b/a *Metro Station*, which are all retail facilities that present, sell and rent to the consenting adult public a variety of non-obscene but sexually explicit expressive materials. Second were Danny's Inc., d/b/a *Thorobred II*; Entertainment Enterprises, Inc., d/b/a *The Godfather*; Gold Coast, Inc., d/b/a *Thorobred III*; Hayes Entertainment, Inc., d/b/a *Thorobred IV*; LLL, Inc., d/b/a *Greenlight Lounge*; Phat's Bar & Grill, Inc., d/b/a *Phat's Bar & Grill*; Riverview Entertainment, Inc., d/b/a *Thorobred VI*; South Dixie Entertainment, Inc., d/b/a *Thorobred VII*; Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*; Teddy's Inc., d/b/a *Thorobred V*; Thorobred, Inc., d/b/a *Thorobred Lounge*; Foxy Lady, Inc., d/b/a *Foxy Lady Gentlemen's Club*; Tinsley's Central Bar, Inc., d/b/a *Bear Necessities, Inc.*; and Win Place and Show Bar, Inc., d/b/a *Win, Place & Show Bar*, all of which are liquor-licensed establishments (except for Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*, which does not have a liquor license) that present to the consenting adult public a variety of female exotic performance dance entertainment where entertainers perform at times fully clothed, at times "topless," and at other times fully nude. All of these Plaintiffs and Intervenors are referred to hereinafter simply as "Plaintiffs."

restraining order; granting Defendant's motion for summary judgment as to all issues except for § 111.36(B)(2)(b) (a requirement of the disclosure of principal owners) and § 111.35(D) (a "no touch" provision); granting Plaintiffs' motion for temporary injunction only with regard to those two sections "until further order of this Court;" and denying the remainder of that motion. R. Vol. VII, pp. 942-62; Apx. A. The circuit court granted virtually complete summary judgment to the Defendant: 1) Without permitting the completion of discovery on matters which the court acknowledged, at least at one point, were relevant to the issues in the case; 2) without conducting any evidentiary hearing; 3) without permitting oral argument on any of the then-pending motions; and 4) after intentionally, and with the consent of the parties, "sanitizing" certain evidence from the record on critical factual issues which the parties acknowledged were not then pending before the court.

The circuit court denied a motion for stay pending appeal and, rather, stayed enforcement of Chapter 111 only long enough for the Plaintiffs to seek a stay from this Court. It further ordered the filing of a $25,000.00 bond from each Plaintiff and Intervenor for that short stay period. R. Vol. VII, pp. 1033-38. Upon application, this Court issued such a stay pending appeal and reduced the bond amount to $500.00 per Plaintiff. R. Vol. VII, pp. 1044-54. Other relevant facts and proceedings will be discussed below.

Plaintiffs all timely filed Notices of Appeal, and Metro filed a cross-appeal with regard to the rulings concerning §§ 111.36(B)(2)(b) and 111.35(D).

STATE CONSTITUTIONAL PROVISIONS AT ISSUE

Ky. Const. § 1. "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: First: The right of enjoying and defending their lives and liberties. . . .Third: The right of seeking and pursuing their safety and happiness. Fourth: The right of freely communicating their thoughts and opinions. . . . Sixth: The right of assembling together in a peaceable manner for their common good. . . ."

Ky. Const. § 2. "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

Ky. Const. § 8. ". . .Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty."

Ky. Const. § 14. "All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

Ky. Const. § 26. "To guard against transgression of the high powers which we have delegated, We Declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void."

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING NEARLY THE ENTIRETY OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE CHAPTER 111 IS INFIRM UNDER THE KENTUCKY CONSTITUTION.

A. STANDARD OF REVIEW.

The standard of review regarding a grant of summary judgment is "whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." **Horne v. Precision Cars of Lexington, Inc.**, 170 S.W.3d 364, 366 (Ky. 2005). "Summary judgment is only proper when it would be impossible for the plaintiff to produce any evidence at trial warranting a judgment in his favor. In ruling on a motion for summary judgment, the court is required to construe the record in a light most favorable to the party opposing the motion." **Id.** (citations omitted). And, "[t]here is no requirement that the appellate court defer to the trial court since factual findings are not at issue." **Lucchese v. Sparks-Malone, P.L.L.C.**, 44 S.W.3d 816, 817 (Ky. App. 2001). Finally, conclusions of law, which are the rulings at issue here, are subject to "independent *de novo* appellate determination." **Gosney v. Glenn**, 163 S.W.3d 894, 898 (Ky. Ct. App. 2005).

B. THE LICENSING SCHEME OF CHAPTER 111 EFFECTUATES AN IMPERMISSIBLE PRIOR RESTRAINT UPON EXPRESSION.

"A 'prior restraint' exists when speech is conditioned upon the prior approval of public officials." **Nightclubs, Inc. v. City of Paducah**, 202 F.3d 884, 889 (6th Cir. 2000), *citing* **Southeastern Promotions, Ltd. v. Conrad**, 420 U.S. 546, 553 (1975).[3] *See also* **Near v. Minnesota**, 283 U.S. 697, 713 (1931). Under federal jurisprudence, "[a]ny system of prior restraints of expression comes to this Court bearing a ***heavy presumption against its constitutional validity***." **Vance v. Universal Amusement Co., Inc.**, 445 U.S. 308, 317 (1980) (emphasis added), *quoting* **Bantam Books, Inc. v. Sullivan**, 372 U.S. 58, 70 (1963). This is all-the-more so with regard to the Kentucky Constitution. *Accord* **James v. Hines**, 63 S.W.3d 602, 606 (Ky. Ct. App. 1998), *appeal dismissed* ("Prior restraint on speech is ***presumptively unconstitutional***") (emphasis added).

First, Plaintiffs make the general observation that the Kentucky Supreme Court has often declared that the State Constitution affords broader protections than the Federal Constitution.[4] This is because:

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[3] Although Plaintiffs' claims below were predicated solely upon the Kentucky Constitution, they will cite extensively herein to federal precedent as state constitutional rights cannot fall below the minimum guarantees of individual rights under the United States Constitution. **The Elk Horn Coal Corp. v. Cheyenne Resources, Inc.**, 163 S.W.3d 408, 417-18 (Ky. 2005).

[4] *See, e.g.*, **Commonwealth v. Brandenburg**, 114 S.W.3d 830, 835 (Ky. 2003) (court has right to "enhance the protections

> "Contrary to popular belief, the Bill of Rights in the United States Constitution represents neither the primary source nor the maximum guarantee of state constitutional liberty. Our own constitutional guarantees against the intrusive power of the state do not derive from the Federal Constitution. . . . [W]hile there is, of course, overlap between state and federal constitutional guarantees of individual rights, they are by no means identical.
>
> * * *
>
> Both the record of the 1890-91 debates and the opinions of Justices of this Court who were the contemporaries of our founding fathers express protection of individual liberties ***significantly greater than the selective list of rights addressed by the Federal Bill of Rights***."

Commonwealth v. Wasson, 842 S.W.2d 487, 492, 494 (Ky. 1992) (invalidating the states sodomy law based on privacy grounds) (emphasis added).

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afforded the citizens of this Commonwealth by the Kentucky Constitution"); **Yeoman v. Commonwealth**, 983 S.W.2d 459, 474 (Ky. 1998) ("privacy rights guaranteed by the Kentucky Constitution exceed those granted by the United States Constitution"); **Dean v. Commonwealth**, 777 S.W.2d 900 (Ky. 1989), *overruled on other grounds* (right of confrontation broader); and **Rose v. Council for Better Educ., Inc.**, 790 S.W.2d 186 (Ky. 1989) (finding a fundamental right to an adequate public education, even though the United States Supreme Court had rejected just such an argument).

Here, Ky. Const. §§ 1, 2, 8 and 26 contain language far broader than the First Amendment. Indeed, the Kentucky Constitution protects the freedom of speech and communication in not one, but ***two*** separate provisions. Ky. Const. §§ 1(Fourth) and 8. Then, there is the broad limitation upon government as set forth in Ky. Const. § 26. This demonstrates that Kentucky has indeed chosen the broadest protections for expression that are possible. Moreover, this Court should not consider the textual difference between the Federal and State Constitutions to be insignificant. Indeed, "each word in the Constitution should be given meaning and effect. . . ." **Hodgkin v. Kentucky Chamber of Commerce**, 246 S.W.2d 1014, 1016 (Ky. Ct. App. 1952). This admonition should be kept in mind when considering the precedent below which discusses the literal differences between the federal and state constitutional provisions at issue.

Second, and more specifically, the *Pennsylvania* Constitution has been interpreted to afford extremely broad protections against prior restraints. This is important because:

> "In an article in the Kentucky Law Journal, Vol. 80: 1991-92, No. 1, *the Kentucky Bill of Rights: A Bicentennial Celebration*, by Gormley and Hartman, the authors attribute the source of much of our original Kentucky Bill of Rights to the then recently enacted Pennsylvania counterpart:
>
> > 'A comparison of the Kentucky Bill of Rights of 1792 and a number of earlier, now defunct constitutions of the leading colonies, ***demonstrates unequivocally that the***

> ***original Kentucky Bill of Rights was borrowed almost verbatim from the Pennsylvania Constitution of 1790.'***
>
> The evidence supporting this proposition is carefully documented in the article."

Wasson, 842 S.W.2d at 492 (emphasis added).

Accordingly, as succinctly stated by the State Supreme Court:

> "***Decisions of the Pennsylvania Supreme Court interpreting like clauses in the Pennsylvania Constitution are uniquely persuasive in interpreting our own.***"

Id. at 498 (emphasis added).[5]

At the time of adoption of the Kentucky Constitution, as well as the federal constitution and the constitution of the State of Pennsylvania, there were two philosophical approaches to the freedoms of speech and the press. The more limited was the Blackstone view that freedom of speech meant only

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[5] *See also* **Yeoman**, 983 S.W.2d at 473 ("decisions of the Supreme Court of Pennsylvania, when interpreting provisions of the Pennsylvania Constitution similar to that of the Kentucky Constitution, are ***very persuasive*** to the Courts of the Commonwealth and should be given as much deference as any non-binding authority receives") (emphasis added); and Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 Temp. L. Rev. 541 (1989) (influence of Pennsylvania's Constitution is remarkable).

freedom from prior restraint. Under Blackstone's view, there could, however, be punishment for the "abuse" of that liberty. The other was a natural rights philosophy advanced in the works of John Locke, which taught that freedom of speech was an "inalienable" natural right that was always retained by the individual, limited only by the fundamental rights of others. A detailed and scholarly discussion of these competing theories is found in the very recent decision of the Oregon Supreme Court in **Oregon v. Ciancanelli**, 121 P.3d 613, 620 (Or. 2005).

It is beyond question that Kentucky has chosen the broadest protections possible by *blending* these two philosophical approaches into the State Constitution. Certainly, Ky. Const. § 1 contains natural rights attributes (its refers to the "***inalienable*** rights" of men to "freely communicate their thoughts and opinions" (emphasis added)). In addition, in also adopting a Blackstonian approach to these liberties, the Framers drafted Ky. Const. § 8 to protect the "free and full" right to speak, write and print "on any subject," while holding individuals "responsible for the abuse of that liberty."

Similarly, it is clear that the framers of the Pennsylvania constitution chose broad protections against prior restraints as well. In **Long v. 130 Market St. Gift & Novelty of Johnstown**, 440 A.2d 517 (Pa. Super. Ct.1982), the Superior Court of Pennsylvania noted that Blackstone's approach had become part of the "bedrock of Pennsylvania's constitutional system," and that under their state constitution, there were two distinct elements to the right of freedom of expression.

> "The first, ***arguably an absolute right,*** guarantees to each citizen the freedom to make public whatever he may choose. ***The prohibition against the prior restraint of publication serves to protect the sanctity of this right.***"[6]

Id. at 525 (emphasis added).

The Pennsylvania Supreme Court concurs in these comments. In **William Goldman Theatres, Inc. v. Dana**, 173 A.2d 59 (Pa. 1961), the High Court, in addressing the interpretation of the Pennsylvania constitutional right of free expression as a matter of first impression,[7] succinctly held that "it is clear enough that what it was designed to do was to ***prohibit the imposition of prior restraints upon the communication of thoughts and opinions***,

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[6] The second distinct element to the right of freedom of expression under the Pennsylvania and Kentucky constitutions is the responsibility "for the abuse of that liberty." The court in **Long** further noted that "[i]t would seem that the right to ***trial by jury . . . protects the sanctity of this more limited right.***" **Long**, 440 A.2d at 525 (emphasis added). However, there is no right to trial by jury with regard to the criminal disability provisions of Chapter 111 further discussed, *infra*, which can effectuate an absolute prior restraint upon expression. Rather, the Director, and not a jury, makes the decision that an individual or business is precluded from engaging in protected expression in the Louisville/Jefferson County area. Because the Ordinance does not require a determination by jury of penalties under Chapter 111 (including license suspension and/or revocation), the Ordinance is constitutionally infirm for this additional reason.

[7] As will be discussed further herein, that provision served as the basis for the rights found in Ky. Const. § 8.

leaving the utterer liable ***only*** for the abuse of the privilege." **Id**. at 62 (emphasis added). In discussing the renowned Blackstone Commentaries and the prohibition against prior restraints, the Pennsylvania Supreme Court further observed that what Blackstone had recognized as the law of England came to be "an established constitutional right in Pennsylvania as to both speech and press. . . ."

Accordingly, the Pennsylvania courts have acknowledged the "***arguably . . . absolute right***" to be free from prior restraints. This Court should recognize and indeed follow this "uniquely persuasively" precedent from the State of Pennsylvania.[8] *See also* **Commonwealth v. Campbell**, 117 S.W. 383, 385-86 (Ky. Ct. App. 1909) (this Court following the Blackstone approach in differentiating between absolute and relative rights).

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[8] Similarly, Tennessee, whose state constitution was also borrowed "***in virtually identical form***" from the Pennsylvania constitution, has also recognized the broad prohibitions against prior restraints (an "arguably absolute right") by directly and liberally quoting from **Long** in **Tennessee v. Marshall**, 859 S.W.2d 289, 293 (Tenn. 1993). That court further observed, in adopting the Pennsylvania approach, that "[t]here is no indication in the journals chronicling the historical development of the Constitutions of Tennessee, nor in any prior Tennessee Supreme Court cases, that the delegates to Tennessee's Constitutional Convention in 1796 intended, when they adopted, ***verbatim***, the language that was contained in Article 9, Section 7 of the Pennsylvania Constitution of 1790, ***that such language have any meaning other than that which had been, and continues to be, attributed to it in the context of the Pennsylvania Constitution of 1790.***" **Id.** at 294 (emphasis added).

Therefore, because Chapter 111 is clearly a prior restraint (in that no one can engage in the defined conduct within the county without prior governmental approval from the Director), it is invalid in-and-of itself under the plain language of the Kentucky Constitution. Yet, an additional facet of the Ordinance further makes this point.

In order to obtain an adult entertainment establishment license, each principal owner,[9] officer, director, general partner, and "each other person who will participate directly in decisions relating to management of the business" must be identified in the application and must list thereon all convictions for "specified criminal activities as defined in this Chapter. . . ." § 111.36(B)(2)(b) and (6). In fact, all such persons must ***sign*** the application for a business license "***as the applicant*** . . . ." § 111.36(B)(2)(b) (emphasis added).

An application for an adult entertainment establishment license is to be denied if the "applicant" has been convicted of a "specified criminal activity. . . ." § 111.38(A)(4). These include the crimes of rape, sexual misconduct, indecent exposure, falsifying business records, prostitution, obscenity, engaging in organized crime, and even offenses relating to controlled substances. § 111.02. Such convictions preclude licensing for two years from the date of a conviction for a misdemeanor offense; five years from the date of a felony conviction; and five years from the date of the last conviction of two or

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[9] A "principal owner" is defined as a person owning 20% or more of a business. § 111.02.

more misdemeanor offenses occurring within any twenty-four month period. § 111.02.

In addition, each and every person employed at an adult entertainment establishment must obtain an employee license prior to working -- even janitors! *See generally* § 111.40(D) and § 111.42(A). An employee license must also be denied if the Director determines that the employee applicant has been convicted of a "specified criminal activity." § 111.42(B). Interestingly, while this restriction parrots the requirement for club licenses, employee applicants are ***not*** – for whatever reason – obligated to disclose any such convictions on their applications. *See, e.g.*, § 111.42(A)(1)-(7).

Any license may be suspended if the licensee "knowingly or recklessly violated or is not in compliance with any section of this chapter. . . ." § 111.43(A). A license may be revoked if the licensee "knowingly or recklessly commits two or more violations specified in this chapter within a 12-month period," § 111.43(B), or for a single instance of certain criminal conduct. § 111.43(C). The fact that a conviction is being appealed "shall have no effect on the revocation of the license. . . ." § 111.43(D). A license revocation is effective for a period of ***one year***. § 111.43(E).

All of these sections of Chapter 111, in combination, will be referred to hereinafter as the "***criminal disability provisions***" of the Ordinance.

The circuit court upheld these restrictions, R. Vol. VII, pp. 942-62; Apx. A, pp. 6-7, yet also concluded that it believed that Plaintiffs did not have

standing to challenge them.[10] **Id.** at 7. However, the criminal disability provisions are unquestionably prior restraints upon expression, and accordingly fail to pass muster under the Kentucky Constitution.

First, since prior restraints should not be permitted ***at all*** under the Kentucky Constitution, these provisions are impermissible and invalid. They disenfranchise certain individuals and businesses from engaging in expression-related activities, and therefore unquestionably effectuate an impermissible prior restraint. Indeed, supreme courts of a number of states have come to the conclusion that these types of criminal disability provisions are constitutionally infirm.[11]

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[10] Plaintiffs certainly have standing because they are required to pay the application fees which are used to defray the costs of the criminal background checks which facilitate administration of the criminal disability provisions. In addition, all "applicants" must forego their privacy rights and provide certain personal information and submit to a criminal background check.

[11] *See, e.g.*, **Perrine v. Municipal Court**, 488 P.2d 648, 652 (Cal. 1971), *cert. denied*, 404 U.S. 1038 (1972) (ordinance unconstitutional as no showing had been made that persons convicted of specifically articulated sex crimes were "in any way disqualified to participate in the operation of a[n adult] bookstore or likely to abuse the right to do so to promote any criminal propensities that they may still possess") (clarification added); **City of Colorado Springs v. 2354, Inc.**, 896 P.2d 272, 288-89 (Colo. 1995); **Seattle v. Bittner**, 505 P.2d 126, 131 (Wash. 1973); and **Alexander v. City of St. Paul**, 227 N.W.2d 370, 373 (Minn. 1975) (holding that the presumptive unconstitutionality of a criminal disability provision which effectuated a prior restraint could be overcome only upon a showing that the continued operation of a business would present a "clear and present danger" of a substantive evil). *Compare* **James**, 63 S.W.3d at 606

Second, there is also federal precedent that establishes the infirmity of such restrictions. Most telling is the recent Seventh Circuit decision in **Schultz v. City of Cumberland**, 228 F.3d 831 (7th Cir. 2000), where that Circuit succinctly concluded:

> "The First Amendment also does not allow licensing provisions based on criminal history that 'totally prohibit certain classes of persons' from First Amendment expression . . . . 'We know of no doctrine that permits the state to deny to a person First Amendment liberties other than the right to vote solely because that person was once convicted of a crime or other offense.'. . . Accordingly, the Ordinance disqualification provisions . . . for operator and employee licensing are unconstitutional as well . . . . Like the disqualification provisions struck down as unconstitutional in **Genusa [v. City of Peoria**, 619 F.2d 1203 (7th Cir. 1980)] these license ineligibility provisions ***absolutely disentitle classes of speakers from a category of expression***. They produce a complete ban on certain expression for a disqualified group of applicants who, by definition, wish to speak, and such a drastic measure ***cannot be justified here as narrowly tailored to resist noisome secondary effects***."[12]

("Prior restraint must be supported by findings that a 'clear and present danger of actual prejudice or an imminent threat' to the defendant is present").

[12] Consequently, criminal disability provisions such as are found in Chapter 111 ***cannot*** be justified upon a concern of "adverse

secondary effects" as is the stated purpose of this Ordinance. *See* further discussion in Section IV, *infra*. While the United States Supreme Court has never directly ruled on the validity of these types of disability provisions, a number of its decisions, and in particular those dealing with "adult" entertainment, certainly imply that they would be ruled unconstitutional. *See, e.g.*, **Arcara v. Cloud Books, Inc.**, 478 U.S. 697, 705 n.2 (Court held that a nuisance abatement padlocking of an adult bookstore for non-speech related activities (prostitution and lewdness) did not constitute an impermissible prior restraint since respondents were "***free to carry on their bookselling business at another location***," which would not be the case here where the disabled individuals and businesses are precluded from engaging in protected activities anywhere in the County) (emphasis added); **Alexander v. United States**, 509 U.S. 544, 551 (1993) (Court concluded that the forfeiture provisions of the federal RICO statute did not violate the First Amendment as it "impose[d] no legal impediment to--no prior restraint on--petitioner's ability to engage in any expressive activity he chooses" (clarification added) whereas Chapter 111 violates this doctrine by imposing an absolute "legal impediment" to constitutionally protected expressive conduct); and **City of Los Angeles v. Alameda Books, Inc.**, 535 U.S. 425, 434-42 (2002) (plurality) (Justice Kennedy, in his critical concurring opinion (discussed, *infra*), observed that a municipality may not attempt to address a concern of secondary effects by "suppressing the speech itself." To be constitutional, the law must instead "leave the quantity and accessibility of speech substantially undiminished"). *See also* **Vance**, 445 U.S. at 317 (Prohibition of the future exhibition of films previously found to be obscene found unconstitutional as the future conduct was protected by the First Amendment); **Madsen v. Women's Health Ctr., Inc.**, 512 U.S. 753 (1994) (Previous misconduct or prior illegal activity by anti-abortion protesters could not serve as a basis to deprive them of their right to engage in current and future First Amendment activities); **Simon & Schuster, Inc. v. Crime Victims Bd.**, 502 U.S. 105 (1991) (Individuals convicted of heinous crimes, such as murder, could not be deprived of their First Amendment rights to author, publish, and receive royalties from books describing their criminal activities); and **Ashcroft v. Free Speech Coalition**, 535 U.S.

228 F.3d at 852-53 (emphasis added and clarification, citations omitted).

Here, although the preambles to Chapter 111 do not articulate any reason for engrafting the criminal disability provisions on to the Ordinance (a constitutional failing in-and-of-itself), it is clear that the only basis for these prohibitions could be the conclusion that people who were convicted of crimes in the past would be more likely to engage in such conduct in the future. As is aptly demonstrated above, however, Metro should not be permitted to effectuate such impermissible prior restraints.

C. THE LICENSING FEES ARE UNCONSTITUTIONAL.

The annual fee for an adult entertainment establishment license is $1,000.00. § 111.41. For an employee license, it is $25.00 per year. § 111.42(B). It is clear that the purpose of these fees is, at least in part, to defray the costs of the ***background checks*** necessary to enforce the criminal disability provisions. *See, e.g.*, § 111.42(B) ("Within 20 working days of the application, the Director shall determine whether the applicant has been convicted of a specified criminal activity, as defined in this Chapter"). Given that the criminal disability provisions are infirm for the reasons as set forth above, the license fees are unconstitutional as well.

234, 245(2002) ("[T]he prospect of crime" does not justify laws suppressing protected speech).

As a basic premise, a state may not impose a charge upon the exercise of a constitutional right. **Murdock v. Pennsylvania**, 319 U.S. 105, 113 (1943). Nevertheless, under federal analysis, a licensing fee levied upon "adult entertainment establishments" does not excessively burden First Amendment rights "so long as it is imposed as a regulatory measure to ***defray the cost of investigating the license applicant***." **Broadway Books, Inc. v. Roberts**, 642 F.Supp. 486, 493 (E.D. Tenn. 1986).[13] The fee should be as minimal as necessary to meet the cost to the city. **Id.** The rationale for this rule is that "the power to impose a license tax on the exercise of . . . [First Amendment] freedoms is indeed as potent as the power of censorship." **Murdock**, 319 U.S. at 113 (clarification added).

The burden of proving that the fees are necessary to cover the reasonable costs of the licensing scheme ***lies with the licensing authority***. *See, e.g.*,

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[13] Whether municipalities can any longer impose a particular licensing fee under federal jurisprudence only against "adult" businesses is now open to significant question. *See* **Alameda Books**, 535 U.S. at 445 (Kennedy, J., concurring in the judgment) ("On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. A city may not, for example, impose a content-based fee or tax"). As will be discussed, *infra*, Justice Kennedy's concurring opinion has been determined to be the constitutional "holding" of **Alameda Books**. In addition, the protections against prior restraints as embodied in the Kentucky Constitution would also seem to exclude the notion that the engagement in constitutionally protected activities can be made contingent upon the payment of a fee. Accordingly, the licensing fees as set forth in the challenged Ordinance may be unconstitutional in-and-of themselves, irrespective of the other matters discussed in this subsection.

Kentucky Restaurant Concepts, Inc. v. City of Louisville, 209 F.Supp.2d 672, 691-92 (W.D. Ky. 2002) (in striking down the old Louisville ordinance fees, the district court noted that the "principles governing whether a licensing fee is permissible are ***well-established*** . . ," and that the "municipality bears the burden of presenting evidence that its fee is necessary to defray the cost of administering the regulatory scheme") (emphasis added, citations omitted).

If the criminal disability provisions of the Ordinance are unconstitutional, so clearly then are the application/licensing fees, which are specifically predicated upon administering the criminal disability components of Chapter 111. While the circuit court found that Metro had substantiated the amount of these fees by way of affidavit (Apx. A, p. 6), the lower court decision was, of course, predicated upon the upholding of the criminal disability provisions. If they are infirm, all of the costs associated with administering those provisions – which are indeed the lion's share of the licensing fees – are similarly unjustified, which negates the permissibility of these fees.

D. THE INFIRMITY OF THE LICENSING SCHEME INVALIDATES THE ORDINANCE IN ITS ENTIRETY.

Although Chapter 111 contains a severability provision (§ 111.98), the invalidity of the licensing scheme renders the ordinance invalid in its entirety. The district court decision in **Kentucky Restaurant Concepts,** is particularly illuminating as it involved

the predecessor adult entertainment establishment ordinance. The court there held that:

> "As a practical matter, however, partial operation of Chapter 111 post-severance is untenable. The Ordinance's basic purpose is to regulate sexually oriented businesses. Its primary method for doing so is its licensing and enforcement scheme. Although the Ordinance's substantive provisions are constitutional, they are actually but minor subsets of the broader licensing requirement. For example, enforcement of the "buffer zone" requirement presupposes that an entertainer has a license to dance and an establishment has a license to operate. If the City may not deny or revoke licenses - - the fundamental regulatory mechanism upon which the Ordinance is structured - - then enforcement of the Ordinance is impossible."

209 F. Supp.2d at 701. *Accord* **Artistic Entm't, Inc. v. City of Warner Robins**, 331 F.3d 1196, 1204 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004). The same circumstances apply in the case at bar, and the circuit court should therefore have enjoined the enforcement of the entire Ordinance.

In addition, because the licensing fees are unconstitutional, the entire Ordinance must be enjoined. *See, e.g.*, **Ellwest Stereo Theater, Inc. v. Boner**, 718 F.Supp. 1553, 1574-75, and 1581-82 (M.D. Tenn. 1989) (invalidation of numerous provisions of an adult business licensing ordinance – including the fee provision – rendered it impossible to sever, thereby requiring the entire ordinance to be enjoined); and

City of Chicago Heights v. Public Service Co., 97 N.E.2d 807, 811 (Ill. 1951) (invalidation of licensing fees associated with an ordinance regulating the location and construction of poles, wires, and main electrical lines in streets and other public places rendered the entirety of the ordinance unconstitutional, as the impermissible fee provisions were not severable in that the duties imposed upon the municipal agency "must be performed without reimbursement to the City because the license and permit fees provided for are excessive and void"). Here, Metro certainly did not intend the ***County*** to pay for the costs of administering this Ordinance, and since the fee provisions are therefore infirm, so is the entirety of Chapter 111.

E. THE ANTI-NUDITY PROVISION AND THE ARTICULATED GOVERNMENTAL BASIS FOR THE ENACTMENT OF THE ORDINANCE VIOLATE THE KENTUCKY CONSTITUTION.

Section 111.35(A) provides that it is a violation of the Chapter "for a patron, employee, or any other person to knowingly or intentionally, in an adult entertainment establishment, ***appear in a state of nudity, regardless of whether such public nudity is expressive in nature.***"[14] (Emphasis added). The

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[14] Plaintiffs do not challenge this provision in regard to non-expressive nudity, but rather merely assert that the ban on "expressive" nudity is unconstitutional. Non-expressive public nudity is already prohibited by law. *See* K.R.S. § 510.150(1) (a person is guilty of indecent exposure when he "intentionally

phrase "state of nudity" is basically defined as a person appearing in clothing of something ***less than*** pasties and a G-string. *See* § 111.02 ("NUDITY OR STATE OF NUDITY"[15]). Accordingly, under the Ordinance, entertainers must wear at least pasties and a G-string at all times. ***Under Chapter 111, then, there is to be no fully nude dancing, or even "topless" entertainment, within the county.***

This restriction, and indeed Chapter 111 in its entirety, was enacted upon a purported concern of the "adverse secondary effects" of adult entertainment establishments. § 111.01. While discussed in greater detail in Section IV, *infra*, this doctrine, and indeed the ability to preclude nude entertainment under federal jurisprudence, has been the subject of a rash of highly-fractured plurality opinions from the Supreme Court. *See* **Barnes v. Glen Theatre, Inc.**, 501 U.S. 560 (1991) (three Member plurality concluding that an anti-nudity statute could be justified upon the morality of society); **City of Erie v. Pap's, A.M.**, 529 U.S. 277 (2000) ("**Pap's II**") (five Justices, in two opinions, concluding that an ordinance proscribing public nudity could be justified upon the adverse secondary effects of adult entertainment establishments, but with no majority of Justices agreeing upon the evidentiary

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exposes his genitals under circumstance in which he knows or should know that his conduct is likely to cause affront or alarm to a person eighteen (18) years of age or older").

[15] This is defined as the "showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, or the showing of the female breast with less than a full opaque covering of any part of the nipple and areola."

standards to apply in such circumstances); and **City of Los Angeles v. Alameda Books, Inc.**, 535 U.S. 425 (2002) (fragmented Court discussing the evidentiary burden upon the government in order to substantiate a regulation enacted upon a purported concern of adverse secondary effects). These cases all concluded, however, that in the particular circumstances presented, the Court would apply an intermediate level of constitutional scrutiny pursuant to a four part test as set forth in **United States v. O'Brien**, 391 U.S. 367 (1968).[16]

In its opinion, the circuit court analyzed the constitutionality of Chapter 111 under the **O'Brien** standards. R. Vol. VII, pp. 942-62; Apx. A, p. 4. The court found that this test was the appropriate level of review for determining the constitutionality of the Ordinance "given its stated justification to decrease secondary effects." R. Vol. VII, pp. 942-62; Apx. A, p. 4. However, the Plaintiffs contend that secondary effects is not a permissible basis to reduce the level of constitutional scrutiny under the Kentucky Constitution, and that reference to Pennsylvania law is once again necessary in arriving at this conclusion.

In the years following **Barnes**, courts quickly observed the perplexing, and actually irreconcilable, nature of the various opinions of the Justices. In

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[16] That four-part test examines whether: 1) the regulation at issue is within the government's constitutional power; 2) the regulation furthers an important or substantial governmental interest; 3) the governmental interest is unrelated to the suppression of free expression; and 4) the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. **O'Brien**, 391 U.S. at 377.

attempting to apply the rule of **Marks v. United States**, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds'"), the Sixth Circuit observed that those standards were less helpful in a case where the opinions were so divergent, and the appellate court referred to its job as "reading the tea leaves of **Barnes**." **Triplett Grille, Inc. v. City of Akron**, 40 F.3d 129, 134 (6th Cir. 1994).

In 1998, the Pennsylvania Supreme Court was squarely faced with the **Barnes** dilemma in **Pap's A.M. v. City of Erie**, 719 A.2d 273 (Pa. 1998) ("**Pap's I**"). Finding **Barnes** "hopelessly fragmented" (**Pap's I**, 719 A.2d at 277), that court concluded that the anti-nudity ordinance at issue before it was subject to strict constitutional scrutiny and was unconstitutional ***under the First Amendment***. **Id.** at 278-280. The Supreme Court granted review and reversed in, as stated, yet another plurality decision. **Pap's II**, 529 U.S. 277. This was not, though, to be the final word of that case.

The Supreme Court remanded to the Pennsylvania Supreme Court for a determination of the plaintiffs' overbreadth and state constitutional claims. **Pap's II**, 529 U.S. at 286, 302. In its subsequent decision, reported as **Pap's A.M. v. City of Erie**, 812 A.2d 591, 613 (Pa. 2002) ("**Pap's III**"), ***the Supreme Court of Pennsylvania adjudicated the exact same issue facing this Court with regard to Chapter 111; that being whether an anti-nudity provision which impacts upon expressive entertainment is***

consistent with the state constitutional right of freedom of speech and expression. The Pennsylvania Supreme Court, with only a single dissent (on an evidentiary issue), concluded that it was not.[17] The decision in **Pap's III** is critical here because, as previously stated, ***the Pennsylvania Constitution served as the basis of the Kentucky Constitution.***

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[17] *Accord* **Mendoza v. Licensing Board of Fall River**, 827 N.E.2d 180 (Mass. 2005), where the Massachusetts Supreme Court recently ruled an anti-nudity ordinance unconstitutional, even in the face of the type of secondary effects "evidence" submitted with regard to the enactment of Chapter 111. **Id.** at 189 *n.* 13. That court observed that the focus on "secondary effects" evidence "seems a strong indicator that the ordinance is directed at the form of nudity common in adult entertainment." **Id.** The Massachusetts Supreme Court therefore concluded that the ordinance was unconstitutional as a ban on protected expression. **Id.** at 198-99. Equally as important, the High Court of Massachusetts noted that in exercising its independent judgment to "uphold the cherished protections of the Declaration of Rights as a matter of State constitutional law," **id.** at 191, it was following prior decisions of other state supreme courts, including **Pap's III**, **Mickens v. Kodiak**, 640 P.2d 818, 821-23 (Alaska 1982); and **Bellanca v. New York State Liquor Auth.**, 429 N.E.2d 765 (N.Y. 1981), *cert. denied*, 456 U.S. 1006 (1982). *See also* **City of Nyssa v. Dufloth**, 121 P.3d 639 (Or. 2005), and **Oregon v. Ciancanelli**, 121 P.3d 613 (Or. 2005), where the Oregon Supreme Court, in applying their state constitutional right of freedom of expression (markedly similar to that at issue here and also similar to Pennsylvania right – **Ciancanelli**, 121 P.3d at 634-35) declined to analyze various restrictions of exotic performance dance entertainment under any form of intermediate scrutiny by rejecting a secondary effects justification for such provisions. *See* **Nyssa**, 121 P.3d at 644 (De Muniz, J., dissenting)). These two decisions are discussed in further detail in Section I(H)(1), *infra*.

Upon remand, the Pennsylvania Supreme Court concluded that the anti-nudity ordinance at issue there – ***predicated upon a supposed concern of "secondary effects"*** (as is Chapter 111) – violated Article 1, Section 7 of their state constitution. The court rejected the intermediate scrutiny standard of **O'Brien**, and held that it must apply strict scrutiny, requiring the city to "establish that the regulation be 'narrowly drawn to accomplish a compelling governmental interest.'" **Pap's III**, 812 A.2d at 612.

The Pennsylvania Supreme Court noted that freedom of expression had a "robust constitutional history" in that state. **Id.** at 603-05. Probably most importantly, it stated that:

> "***As purely textural matter, Article I, § 7 is broader than the First Amendment*** in that it guarantees not only freedom of speech and the press, but specifically affirms the 'invaluable right' to the ***free communication of thoughts and opinions***, and the right of 'every citizen' to 'speak freely' on 'any subject' so long as that liberty is not abused. ***'Communication' is obviously broader than 'speech.'***"

Id. at 603 (emphasis added).

Certainly, the same is true here. Ky. Const. § 1 articulates that citizens are imbued with the right of "***freely communicating their thoughts and opinions***," and Ky. Const. § 8 protects the freedom to speak on "any subject." That is not to even mention the

broad protections afforded by Ky. Const. § 26. Consequently, the same rights should apply here.[18]

In addition, in particular regard to the highly fractured plurality opinion in **Alameda Books**, by which any "secondary effects" analysis under the Federal Constitution must be governed, the High Court of Pennsylvania observed: "It is also notable that the five Justices in the U.S. Supreme Court who agreed that the **O'Brien** test applied ***could not agree upon the precise evidentiary showing which***

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[18] Such a conclusion is not foreclosed by the decision in **Hendricks v. Commonwealth**, 865 S.W.2d 332 (Ky. 1993). There, the State Supreme Court upheld a municipal anti-nudity ordinance challenged by a nude dance establishment. **Hendricks** is not dispositive of this issue for three cogent reasons. First, it was decided before **Pap's II** and utilized the now-abandoned **Barnes** standard. Second, its makes no adjudication under the State Constitution, and contains no analysis, let alone even argument, of whether the protections under Ky. Const. § 8 are anything different than what are provided by the First Amendment. Third, and most importantly, **Hendricks** pre-dates, almost by a decade, the Pennsylvania Supreme Court decision in **Pap's III**, which has particular persuasive authority as referenced above because of the use of the Pennsylvania Constitution as the basis for the Constitution of the Commonwealth of Kentucky. For basically these same reasons, **Restaurant Ventures, LLC v. Lexington-Fayette Urban County Gov't**, 60 S.W.3d 572 (Ky. Ct. App. 2001), is similarly inapplicable.

would be required to satisfy that test.[19] **Pap's III**, 812 A.2d at 609-10 (emphasis added).

Elaborating on this lack of guidance, the Pennsylvania Supreme Court held:

> "Although this Court has often followed the lead of the U.S. Supreme Court in matters of free expression under Article I, §7, doing so here is no easy matter, even if we were obliged or inclined to. The position of the decisive Supreme Court concurrence by Justice Scalia – a position rejected by seven other Justices on the High Court – that this ordinance does not raise a question of protected expression at all finds no support in our jurisprudence. Nor does the concurrence offer any illumination on the proper application of the **O'Brien** standard, since the concurrence would have sustained the ordinance on grounds that it did not implicate protected expression at all. Meanwhile, the five Justices who agreed that **O'Brien** should apply ***disagreed upon the application of that intermediate scrutiny test***.

Pap's III, 812 A.2d at 611 (emphasis added).

In light of this dilemma, this Court should heed the words of the High Court of Pennsylvania:

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[19] The circuit court below, however, never confronted this evidentiary dilemma or even the application of Pennsylvania precedent in this regard. Rather, it simply adopted the **O'Brien** standard as a justification to uphold these regulatory provisions and impliedly concluded that whatever evidentiary standard applied, it had been met.

> "As a matter of policy, Pennsylvania citizens should not have the contours of their fundamental rights under our charter rendered uncertain, unknowable, or changeable, while the U.S. Supreme Court struggles to articulate a standard to govern a similar federal question."

Pap's III, 812 A.2d at 611. ***Citizens of Kentucky are entitled to no less***.

This Court should therefore follow this additional "uniquely persuasive authority," and for the same reasons as are articulated by the Pennsylvania Supreme Court that the ordinance at issue in **Pap's III** failed muster under strict scrutiny (812 A.2d at 612-13), similarly conclude that Chapter 111 is constitutionally infirm pursuant to Ky. Const. §§ 1, 2, 8 and 26, and that the circuit court thus erred.

F. THE CIRCUIT COURT ERRED IN FINDING THE HOURS OF OPERATION AND "NO DIRECT PAYMENT" PROVISIONS CONSTITUTIONALLY VALID.

As amended, § 111.18 now precludes an adult entertainment establishment from remaining open for business "between the hours of 1:00 a.m. and 9:00 a.m. on any day." Accordingly, defined establishments (and, again, even those providing no true "adult" entertainment, such as cabarets where entertainers have to wear at least pasties and G-strings at all times) must remain closed and must refrain from engaging in constitutionally protected expressive activities for ***eight hours of each day***. That is ***one-***

third of each day; one-third of each week; and one-third of each year.

PT's is open for business from 11:00 a.m. to 4:00 a.m. Monday through Friday, 4:00 p.m. to 4:00 a.m. on Saturday, and 6:00 p.m. to 2:00 a.m. on Sunday. Affidavit of Brian Franson ("Franson Aff.") ¶ 16; Ex. E to Supp. Brief, Aug. 4, 2004; Apx. I. Mr. Franson, the Area Director of *PT's*, estimates that complying with the hours of operation restrictions as set forth in § 111.18 would result in an approximate reduction of twenty-two percent in the number of customers patronizing *PT's*; a thirty percent reduction in the number of dancers performing at the club; a thirty percent reduction in the number of dances performed; and a thirty-two percent reduction in the revenue generated by the establishment. Franson Aff., ¶ 19; Ex. E to Supp. Brief, Aug. 4, 2004; Apx. I.

Blue Movies operates, and has operated in the past, twenty-four hours a day, seven days a week. Affidavit of Robert Hollis, ¶'s 4-6; Ex. F to Supp. Brief, Aug. 4, 2004; Apx. J. For a "24/7" establishment such as *Blue Movies*, the restrictions in the Ordinance represent a ***33.3% reduction*** in the number of hours that it can be open for business. In Mr. Hollis' estimation, complying with the hours of operation provision would result in a 30% reduction in the number of customers; the amount of expressive materials presented; and business revenues. ¶ 10; Ex. F to Supp. Brief, Aug. 4, 2004; Apx. J.

The circuit court upheld the hours of operation provision set forth in § 111.18 predicated upon the conclusion of the Ninth Circuit in **Center for Fair Public Policy v. Maricopa County**, 336 F.3d 1153

(9th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004). R. Vol. VII, pp. 942-62, Apx. A, p. 18. Reliance on that decision, however, was erroneous for numerous reasons. First, **Center for Fair Public Policy** utilizes (or at least attempts to utilize) the **O'Brien** standard of intermediate scrutiny which is simply not applicable under the Kentucky Constitution. Indeed, the circuit court never explained why it had failed to undertake any independent analysis under the Constitution of the Commonwealth of Kentucky. Second, in light of the fractured nature of **Barnes**, **Pap's II**, and more importantly **Alameda Books**, it is not even clear how those **O'Brien** standards are supposed to be applied. And, again, the circuit court engaged in no discussion of the confusion surrounding, and the disputes in the lower federal courts concerning, application of the **O'Brien** elements, and in particular the "narrow tailoring" component thereof.

Because **Alameda Books** is in fact a plurality ruling, the lower federal courts have struggled to utilize the **Marks** standards in order to determine the constitutional "holding" of that decision. Most courts have concluded that the holding is represented by the

concurring opinion of Justice Kennedy.[20] Reference to his opinion is, therefore, necessary.

Justice Kennedy notes that while regulations may constitutionally be utilized to reduce secondary effects, they ***cannot*** have the consequent effect of also reducing either speech or expression related activities, and must "***leave the quantity and accessibility of the speech substantially undiminished***." **Alameda**, 535 U.S. at 445 (Kennedy, J., concurring) (emphasis added). As he succinctly stated, "***a city may not regulate the secondary effects of speech by suppressing the speech itself***." **Id.** (emphasis added).

Justice Kennedy also observes that a regulation can be consistent with the First Amendment "if it is ***likely*** to cause a ***significant decrease*** in secondary effects and a ***trivial decrease*** in the quantity of speech." **Id.** at 445 (Kennedy, J., concurring) (emphasis added). He summed up his analysis as follows:

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[20] *See, e.g.*, **Ben's Bar, Inc. v. Village of Somerset**, 316 F.3d 702, 721-22 (7th Cir. 2003) (regarding ordinance prohibiting the sale, use or consumption of alcohol on the premises of "Sexually Oriented Businesses," such as is the case here – *see* Section I(G), *infra*); **SOB, Inc., v. County of Benton**, 317 F.3d 856, 861-62 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003) (regarding a public indecency ordinance); **Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County**, 337 F.3d 1251, 1269 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004) (Justice Kennedy's concurring opinion applied to both zoning and public nudity ordinances); and **G.M. Enterprises, Inc. v. Town of St. Joseph**, 350 F.3d 631, 637-38 (7th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004) (Justice Kennedy's concurrence applying to an alcohol prohibition in places where nude dancing occurs, and to a dancer/patron "buffer zone").

> "[A] city ***mus' advance some basis to show*** that its regulation has the ***purpose and effect*** of ***suppressing secondary effects***, while leaving the ***quantity*** and ***accessibility*** of ***speech substantially intact***. The ordinance may identify the speech based on content, but only as a short hand for identifying the secondary effects outside. ***A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with*** [the four Justice dissent authored by] Justice SOUTER. See *post*, at 1746. The rationale of the ordinance must be that it will suppress secondary effects -- ***and not by suppressing speech***.

Id. at 449–50 (Kennedy, J., concurring) (emphasis and clarification added). Equally as important, he further stated that a constitutional analysis directed at these types of regulations ***must*** "address how speech will fare under the city's ordinance." **Id.** at 450.

Irrespective of this, the one court that seems to marginalize Justice Kennedy's concurring opinion is indeed the Ninth Circuit decision in **Center for Fair Public Policy**; the ruling relied upon by the circuit court below. That opinion, however, is a mere two-two-one decision, and even under federal jurisprudence seems to be at odds with the general doctrine of narrow tailoring under intermediate scrutiny.

First, as noted by the dissent in **Center for Fair Public Policy**, if, as all of the other circuits agree, Justice Kennedy's concurring opinion *is* in fact the holding of **Alameda Books**, an hours of operation provision is the ***quintessential*** violation of those

concerns. *See* 336 F.3d at 1172 (Canby, J., dissenting). Second, Justice Kennedy's concurring opinion does no more than truly operationalize the fourth prong of **O'Brien**, which requires that the "incidental" restriction on First Amendment freedoms be "no greater than is ***essential***" to the furtherance of the governmental interest. 391 U.S. at 377. The word "incidental" is generally defined to have two separate components; the effect must be both "***indirect***," and "***minimal***."[21] If the impact is not "indirect," or, more importantly, if it is not "minimal," the regulation fails muster for not being sufficiently narrowly tailored. This is, indeed, all that Justice Kennedy advocates. Given the affidavits of Brian Franson and Robert Hollis, as acknowledged in the circuit court's ruling (R. Vol. VII, pp. 942-62; Apx. A, p. 17), the effect upon expression is neither ***minimal*** nor ***indirect***, and the Plaintiffs' challenges to these draconian provisions should not, therefore, have been summarily dismissed.

Third, economic impact is certainly one of the effects that a court must look at when determining the constitutionality of a law that impacts upon First

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[21] *See, e.g.*, **Webster's II New Riverside Dictionary**, Revised Edition, p. 351 ("2. Subordinate: ***minor***"); **American Heritage College Dictionary**, Third Edition, p. 687 ("1. Occurring or likely to occur as an ***unpredictable*** or ***minor*** accompaniment. 2. Of a ***minor, casual, or subordinate nature***"); **Merriam-Webster's Collegiate Dictionary**, Tenth Edition, p. 587 ("1: being likely to ensue as a chance or ***minor consequence***; 2: ***occurring merely by chance or without intention or calculation***") (emphasis added). *See also* **People v. Glaze**, 614 P.2d 291, 295 (Cal. 1980) (noting that an ordinance which prohibited the operation of film arcades between the hours of 2:00 a.m. and 9:00 a.m. involves "more than the incidental infringement of freedom of expression").

Amendment rights (and, accordingly, state constitutional rights as well). And, for the same reason, the "no payment" provision contained in § 111.35(C) is similarly infirm. As the Supreme Court stated in **Buckley v. Valeo**, 424 U.S. 1, 66 n.76 (1976), "money" is "a necessary and integral part of many, perhaps most, forms of communication." Succinctly put by the Fourth Circuit, "it is obvious that the First Amendment sets limits on the economic burdens that can be imposed upon the dissemination of protected materials." **Hart Book Stores, Inc. v. Edmisten**, 612 F.2d 821, 527 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980).[22]

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[22] *See also* **United States v. Nat'l Treasury Employees Union**, 513 U.S. 454, 468-69 (1995) (Court noted that "because compensation provides a significant incentive toward more expression" by artists, "[b]y denying respondents that incentive, the honoraria ban induces them to curtail their expression," and therefore "unquestionably imposes a significant burden on expressive activity"); **Turner Broadcasting System, Inc. v. F.C.C.**, 520 U.S. 180, 208 (1997) (the Court underwent a detailed economic analysis in determining what the First Amendment benefits and detriments were in regard to the F.C.C. "must carry" provision for cable T.V. broadcasters, and found that -- in invalidating the regulation -- an 11% decline in advertising revenues posed a "***serious risk*** of financial difficulty" and that stations would suffer "financial harm and possible ruin") (emphasis added); **Erznoznik v. City of Jacksonville**, 422 U.S. 205, 211 n.'s 7&8 (1975) (Court invalidated an ordinance that prohibited the showing of films containing nudity at drive-in theaters when the screen was visible from a public street or place, by concluding that the structural requirements necessary to comply with the ordinance would "increase the cost of showing films containing nudity," that in certain circumstances theaters might avoid showing these movies rather than incur the additional costs, that this could result in individuals being unable to see such films, and that the ordinance was therefore

Just as government may not simply ban expression it dislikes, it cannot use financial disincentives and economic hardship to drive disfavored expression into oblivion. The two most relevant cases on this issue are as follows, and well-illustrate the unconstitutional nature of this Ordinance provision.

In **DiMa Corp. v. Town of Hallie**, 185 F.3d 823 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000), the Seventh Circuit upheld an hours of operation restriction that forced an adult business that had previously been open twenty-four hours a day (just like *Blue Movies*) to close from 2:00 a.m. to 8:00 a.m. Monday through Friday, from 3:00 a.m. to 8:00 a.m. on Saturday, and from 3:00 a.m. to noon on Sunday. But while upholding these less restrictive closing hour rules (44 hours, or "about ***one-quarter*** of the hours of the week" (**id**. at 826), as opposed to 56 hours here, or ***one-third*** of the time), the Seventh Circuit noted that "we have no reason to believe that this is a significant impairment of [the Plaintiffs'] business. DiMa has not created a record to show what sort of impact this limitation would have on its business. That is, we don't know how much revenue [the Plaintiff] takes in during the hours that are subject to the regulations. . . ." **Id.** at 831. (Clarification added). In contrast here, the evidence that the circuit court had in front of it clearly

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unconstitutional in that it was a "restraint on free expression"); and **Simon & Schuster, Inc.**, 502 U.S. at 116 (the Supreme Court invalidated a law that took the profits of books written by convicted criminals by noting that such a regulation "imposes a financial disincentive," and that this "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace").

showed the "significant impairment[23]" that the Plaintiffs' businesses would suffer if forced to close their doors during the hours as set forth in the Ordinance.

More importantly, the U.S. Supreme Court has specifically addressed the constitutional ramifications of laws which seek to regulate the times during which "adult" entertainment may be presented. In **United States v. Playboy Entertainment Group, Inc.**, 529 U.S. 803 (2000), the Court found an hours restriction on erotic cable TV broadcasting unconstitutional because of its perceived negative effect upon the economic viability of *Playboy*. The Court struck down the law because it restricted the ability of the *Playboy* channel to broadcast at certain hours of the day (analogous to the circumstances here), with the result being that there was a "significant restriction of communication, ***with a corresponding reduction in Playboy's revenues***." **Id.** at 809 (emphasis added).

Specifically, the Court noted that there would be a 30 to 50 percent reduction in viewing, with a lesser reduction of revenues. **Id.** at 812. While the district court there below had noted that the effect of the regulations on Playboy was "primarily economic," chiefly a mere ***15%*** decline in revenues, it further

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[23] It is interesting to note that the preambles to the Ordinance, in a conclusory fashion, observe that the hours of operation restrictions will have community benefits "without significantly interfering with the availability of adult entertainment." § 111.02(H). Certainly, this evidence establishes that the preamble is incorrect. And, if the preamble is the constitutional justification for this provision, the fact that it is found to be untruthful establishes the infirmity of this Ordinance section.

observed that this impact served as a ***"quantitative measure of the lost First Amendment opportunities suffered by Playboy and its viewers."*** **Playboy Entertainment Group. Inc. v. United States**, 30 F.Supp.2d 702, 711 (D. Del. 1998) (emphasis added). Compare this to the estimated declines here, and in particular the reduction in customers and the engagement in expressive activities, and it is clear that according to the standards of **Playboy** and as subsequently modified by Justice Kennedy's concurrence in **Alameda Books**, this impact is sufficiently severe to cause a First Amendment violation, and therefore a violation under the Kentucky Constitution as well.

Fourth, even the plurality opinion authored by Justice O'Connor in **Pap's II** notes that a significant constitutional infringement would raise the level of constitutional scrutiny and shift the presumption to be against constitutional validity. "If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based." 529 U.S. at 294. The intrusions here are, however, not *de minimis*.

Fifth, the fact that the fractured decision in **Alameda Books** has modified the secondary effects doctrine as first articulated by the Supreme Court in **Renton v. Playtime Theatres, Inc.**, 475 U.S. 41 (1986), is demonstrated no better than by a recent decision from the very federal district court which is continuing the Alameda Books saga following remand from the Supreme Court. In **Alameda Books, Inc. v. City of Los Angeles**, Case No. CV 95 07771 DDP (C.D. Cal., June 10, 2005) (copy of the Order being

attached hereto as Apx. K), the district court there found that "while the **Renton** standard is still the controlling standard in this case, that standard was ***modified*** by the Supreme Court's holding in **Alameda Books**. Specifically, the court agrees with the plaintiffs that ***the proportionality requirement*** [as set forth in Justice Kennedy's concurring opinion] ***adds a new element to the*** **Renton** ***inquiry***. . . ." Apx. K, at 19 (emphasis and clarification added).

That inquiry includes an examination of whether the regulating body advances "some basis to show that its regulation has the purpose and effect of suppressing secondary effects, ***while leaving the quantity and accessibility of speech substantially intact***." Apx. K at 21 (emphasis added), *quoting* **Alameda Books**, 535 U.S. at 449. *See also* Apx. K at 22-24. In addition, the court notes that the government's premise "cannot be merely that cutting adult speech in half would probably reduce secondary effects proportionately."[24] Apx. K at 26. Yet, that is ***exactly*** the purpose and effect of the hours of operation restrictions contained in Chapter 111.

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[24] If this Court does, indeed, seek to "borrow" the convoluted federal jurisprudence of intermediate scrutiny related to sexual expression, this Court must also decide, in addition to the narrow tailoring issue, the evidentiary standards that must be applied in order to satisfy the justification for such regulations. In that event, Plaintiffs contend that this Court should adopt the partial concurrence and partial dissent of Justice Souter in **Pap's II** (529 U.S. at 310-17), and his dissent, joined in by Justices Stevens, Ginsburg and Breyer, in **Alameda Books** (535 U.S. at 453-66), for the reasons stated therein. This issue was not, however, resolved by the circuit court.

Also relevant is the following quote from the **Alameda Books** district court:

> "The City argues that the plaintiffs are unable to cast direct doubt on the rationale for the ordinance as a matter of law. ***The Court does not agree. The plaintiffs have the opportunity to present evidence showing that the ordinance will not significantly reduce secondary effects, or that it will do so by substantially diminishing speech.***"

Appx. K, at 30 (emphasis added).

Here, Plaintiffs submitted ***uncontroverted*** evidence that Metro's approach to reducing secondary effects "will do so by substantially diminishing speech." At the very least, there were material issues of fact which precluded the entry of summary judgment on this issue. For these reasons, the circuit court's decision in upholding the hours of operation provision should be reversed.

G. THE PROHIBITION OF THE SALE OF ALCOHOL IS UNCONSTITUTIONAL.

Section 111.30 prohibits those establishments which hold adult entertainment business licenses from also obtaining liquor licenses. This provision of the Ordinance, however, is preempted by state statute. "[T]he power of the state to regulate the alcoholic beverage industry is supreme. Any delegation of that authority, because of the nature of the industry, must be specific and unequivocal, not merely inferential." **Whitehead v. Estate of Bravard**., 719 S.W. 2d 720, 724 (Ky. 1986). Thus, any local regulation of that

industry must be specifically authorized by either the General Assembly or the Alcoholic Beverage Control Board. **Id.** In **City of Ashland v. Kentucky Alcoholic Beverage Control Bd.**, 982 S.W. 2d 210, 213 (Ky. Ct. App. 1998), this Court held that absent express or specific authority to disqualify certain retailers from holding an alcoholic beverage license, such a restriction was invalid, and stated:

> "However, there is no express or specific authority to create a scheme that disqualifies certain types of retailers such as grocery stores or gasoline stations from obtaining a package license to sell alcoholic beverages. We agree with the lower court that any conflict between the City's ordinance and a specific statute must be resolved in favor of the statute. *See* **Commonwealth v. Do, Inc., Ky.**, 674 S.W.2d 519 (1984)."

Recently, in **Ky. Licensed Beverage Ass'n v. Louisville - Jefferson County Metro Gov't**, 127 S.W.3d 647 (Ky. 2004), the Supreme Court again reaffirmed that where a local ordinance is in conflict with state statues, it may not be enforced:

> "Accordingly, the Metro Government's ordinance is in conflict with state statutes on the subject and is not authorized pursuant to any home rule statute cited above. Therefore, in absence of a particular grant of authority to regulate non-licensees by the imposition of civil fines in KRS 241 et seq., **the Metro Government is without authority to apply the penalties set forth in the Ordinance to non-licensees.** *See* **Boyle v. Campbell, Ky.**,

> 450 S.W.2d 265, 268 (1970) (invalidating a city ordinance dealing with Sunday Closing laws, and holding that "if the doctrines of 'preemption' and 'conflict' are not dispositive . . . there is a basic concept which invalidates this ordinance. . . . that the City of Bowling Green simply lacks the authority by local law to amend, modify, interpret or construe at [sic] state statute")."

Id. at 649.

Clearly, there is no state statute that prohibits a business engaged in "adult entertainment" from applying for and receiving a liquor license. And, as stated, a number of the Plaintiffs, in fact, possess just such a license. This provision is therefore statutorily preempted in regard to them.

Moreover, the government may not condition the issuance of a license upon the agreement of the applicant to give up or waive his or her constitutional rights,[25] as the Sixth Circuit made clear in **G & V**

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[25] It is anticipated that Metro will attempt to rely upon **Louisville v. Woods**, 883 S.W.2d 881 (Ky. Ct. App. 1993), in support of its argument that a municipality may regulate nude or semi-nude dancing at an ABC licensed premise and can therefore prohibit an adult business from obtaining a liquor license. Such an argument would be disingenuous since **Woods** did not address the question of whether Louisville could prohibit a business which presents adult entertainment from obtaining a liquor license. Rather, it merely held that a municipal ordinance which restricted nude or semi-nude dancing was not preempted by the ABC regulation, thereby allowing enforcement of the City ordinance. In finding no preemption, the **Woods** court held that the "ordinance does not conflict with or usurp the state's 'scheme.' It is merely in addition to what the state has attempted to provide as a minimum

Lounge, Inc. v. Michigan Liquor Control Commission, 23 F.3d 1071, 1077 (6th Cir. 1994). The Ordinance flatly contradicts the well-established precedent that a state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or entertainment permit, on an agreement to refrain from exercising one's constitutional rights, especially one's right to free expression. **Id.**[26]

Nevertheless, § 111.44 requires that the liquor-licensed Plaintiffs, as a condition of obtaining their adult business licenses, give up their valuable liquor licenses. Those Plaintiffs have, however, made significant investments in time, money and energy in establishing their businesses, and each of their

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standard, and there is nothing to prevent a local government from establishing minimum standards of conduct permissible in its own territory." **Id**. at 884. In this case, an adult business is prohibited from obtaining an ABC license in the first instance - thus preventing it from complying with local law.

[26] *See also* **Perry v. Sinderman**, 408 U.S. 593, 597 (1972) ("For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially his interest in freedom of speech"); **Keyshian v. Board of Regents**, 385 U.S. 589, 606 (1967); (*quoting* **Sherbert v. Verner**, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege"); and **44 Liquormart, Inc. v. Rhode Island**, 517 U.S. 484, 513 (1996) (". . . .it does not follow that conferral of [a governmental] benefit may be conditioned on the surrender of a constitutional right") (clarification added).

licenses are valuable. Metro may not condition the maintenance of the Plaintiffs' liquor licenses upon their willingness to give up their right to engage in constitutionally protected expression. As such, the imposition of such a condition as a requirement to obtain or maintain a liquor license is blatantly unconstitutional and is preempted by state law.

H. THE CIRCUIT COURT ERRED IN UPHOLDING THE ENTERTAINMENT "BUFFER ZONE" PROVISIONS AS THEY ARE INFIRM UNDER THE KENTUCKY CONSTITUTION.

Chapter 111 creates an entertainment "buffer zone" by providing that it is a violation for any employee to appear "semi-nude" (i.e., while *clothed*) unless he or she is located:

> ". . .[A]t least six (6) feet from any patron or customer and on a fixed stage at least eighteen (18) inches from the floor. The six (6) foot requirement is measured from the edge of the stage where the semi-nude employee is located to the patron seating or standing area, or, if patrons are allowed to sit at the stage, from the edge of the stage to a line or other barrier six feet from the edge beyond which employees are allowed to appear semi-nude."

§ 111.35(B). The circuit court erred in upholding the constitutionality of such provisions as they violate the Kentucky Constitution for a variety of reasons.

1. THE BUFFER ZONE DOES NOT PASS MUSTER UNDER THE HEIGHTENED SCRUTINY REQUIRED BY THE KENTUCKY CONSTITUTION.

That the six-foot buffer zone does not pass scrutiny under the Kentucky Constitution is ***directly*** demonstrated by the Oregon Supreme Court's recent consideration of the constitutionality of a similar (but two foot ***smaller***) buffer zone under Art I, Section 8 of the Oregon Constitution[27] in **City of Nyssa v. Dufloth**, 121 P.3d 639 (Or. 2005). There, the ordinance in question required every entertainer to be clothed unless "removed at least four feet from the nearest patron."[28] **Nyssa**, 121 P.3d at 640. In its decision, the Oregon Supreme Court relied on its analysis in the related case of **Ciancanelli**, decided the same day. That decision found that a statute prohibiting "live public shows" in which participants engaged in "sexual conduct" was aimed directly toward the expressive aspect of the conduct that the law described, and therefore was a regulation restraining free expression. **Id.** at 634.

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[27] Article I, Section 8 of the Oregon Constitution is similar to the corollary provisions of the Kentucky Constitution, and provides that: "No law shall be passed restraining the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

[28] It is important to note that the buffer zone in Nyssa applied in regard to ***nude*** entertainers. As stated herein on numerous occasions, neither nude nor even "topless" entertainment is permitted under the provisions of Chapter 111.

Applying that construct, the court in **Nyssa** found that a four foot entertainment buffer zone was also specifically directed by its terms at restraining free expression since the ordinance applied only to performances in establishments that regularly featured nude entertainment. **Nyssa,** 121 P.3d at 643-35:

> "... [T]he legislature constitutionally may enact laws designed to prohibit or punish conduct that amounts to prostitution or other criminal activity, but *Article I, section 8*, precludes the Legislature from using limitations on speech or expression as a substitute for regulating that conduct directly. . . . In the present case, the city constitutionally can regulate such conduct as sexually contact between performers and patrons, and the fact that an individual uses speech or expression in the course of that conduct would not immunize the individual from prosecution. However, that is not what the ordinance at issue here does. The four-foot ordinance does not specifically preclude or even refer to sexual contact between performers and patrons. Rather, as discussed, it simply restrains certain kinds of expression in certain kinds of establishments."

Nyssa, 121 P.3d at 644 n.5 (citations omitted). Accordingly, the buffer zone ordinance was found unconstitutional on its face as a restraint upon free expression. **Id.**

The six foot buffer zone here is similarly directed solely at the expressive aspect of live entertainment, and is therefore a direct restraint on expression

protected by the Kentucky Constitution. As noted in **Nyssa**, these types of buffer zones are aimed directly at a particular type of expression as they only apply to "one disfavored type of communication (nude performances) in one disfavored type of establishment (one that regularly features that type of entertainment)." **Id.** at 643 (clarifications in original). Like the **Nyssa** ordinance, Chapter 111 also restrains free expression and should therefore have been declared unconstitutional.

2. THE ENTERTAINMENT BUFFER ZONE PROVISIONS ARE UNCONSTITUTIONAL AS THEY VIOLATE THE STATE RIGHT OF ASSOCIATION.

Section 1 of the Kentucky Constitution protects the freedom of association. The corollary rights protected under the First Amendment are described in **Roberts v. United States Jaycees**, 468 U.S. 609, 618 (1984), where the Court stated that it "has recognized a ***right to associate*** for the purpose of ***engaging in those activities protected by the First Amendment***." (Emphasis added). Here, of course, Plaintiffs are engaged in "First Amendment" speech-related activities. And, the Sixth Circuit has agreed that exotic dance performers and patrons desiring to view such entertainment are indeed imbued with freedom of association protections under the First Amendment. **Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County**, 274 F.3d 377, 396-97 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073 (2002).

Most importantly, freedom of association rights are not analyzed under an intermediate level of scrutiny.

Rather, infringements on such liberties must pass muster under strict scrutiny in order to be upheld. "Infringements on that right may be justified by regulations adopted to serve ***compelling*** state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." **Roberts**, 468 U.S. at 623 (emphasis added). *Accord* **Deja Vu of Nashville**, 274 F.3d at 396. Consequently, the freedom of association rights under the Kentucky Constitution must be evaluated pursuant to strict scrutiny as well.

The circuit court improperly rejected Plaintiffs' freedom of association argument in regard to the entertainment buffer zone provisions by in fact relying upon **Deja Vu of Nashville**. R. Vol. VII, pp. 942-62; Apx. A, p. 16. However, what it failed to recognize was that the Sixth Circuit there ***agreed*** that exotic dance entertainers and their patrons (even while nude - - which is certainly not the circumstance here) receive freedom of association rights under the First Amendment, and that a ***three foot*** buffer zone was narrowly tailored because "it went no further than necessary. . . ." **Id.** at 396-97.

> "In attempting to restrict opportunities to engage in prostitution and to guard against the spread of disease through the public release or exchange of bodily fluids, Metropolitan Nashville ***has gone no farther than necessary*** by requiring ***a three-foot distance*** between the erotic dancer and the audience."

Deja Vu of Nashville, 274 F.3d at 396-97 (emphasis added). *See also* **Kentucky Restaurant Concepts**,

209 F.Supp.2d at 680-82 (a ***three foot*** dancer/patron buffer zone contained in the now-superceded Louisville Code of Ordinances went "no further" than necessary and was therefore sufficiently narrowly tailored).[29]

Consequently, given the fact that Metro has enacted a buffer zone ***twice as large*** as the Sixth Circuit and the federal district court here in Louisville have noted to be necessary to effectuate the purported governmental interests, it goes without saying that such a requirement cannot pass muster under the narrow tailoring component of ***either intermediate or strict scrutiny***. In addition, the governmental concerns noted by the Sixth Circuit in **Deja Vu of Nashville** are simply irrelevant here, for those entertainers could dance ***fully nude***. Here, Chapter 111 ***specifically precludes*** such dance entertainment.

3. THE ENTERTAINMENT BUFFER ZONE FAILS MUSTER EVEN UNDER FREE SPEECH INTERMEDIATE SCRUTINY.

Assuming, *arguendo*, that the constitutionality of the entertainment buffer zone under Ky. Const. § 8 is to be evaluated pursuant to federal intermediate scrutiny (whatever that may be), the first thing for this Court to determine is whether Metro had the power to enact this regulation in the first place. **O'Brien**, 391 U.S. at 377. It did not.

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[29] In addition, both of these cases were decided before the Supreme Court decision in **Alameda Books**, which significantly undercuts any contention that the government can enact such entertainment buffer zones.

The preambles to Chapter 111 do not articulate a specific reason for adoption of these restrictions. Accordingly, it is somewhat difficult to discern the supposed governmental interest underlying their enactment. However, it is safe to conclude that the supposed purpose was to reduce the chance of any illegal activity occurring between dancers and customers; *i.e.*, some type of illegal or impermissible touching between the two. However, there is nothing inherently illegal about an entertainer, while wearing pasties and a G-string, from dancing five feet eleven inches away from a customer, or performing on a stage that is only seventeen (as opposed to eighteen) inches "from the floor." § 111.35(B).

Consequently, the ability of Metro to enact this "buffer zone" is governed by the dictates of the Supreme Court in **Ashcroft v. Free Speech Coalition**, 535 U.S. 234 (2002), where the Court concluded that the government may not prohibit speech "because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" Metro simply does not then have the authority to preclude a form of close but ***clothed*** dancing which does not consist of some form of illegal contact. The remedies available to government are to punish violations of the law; not to abridge the rights of free speech. **Free Speech Coalition**, 535 U.S. at 245. See also **Commonwealth v. Ashcraft**, 691 S.W.2d 229, 232 (Ky. Ct. App. 1985) (regulation is overbroad when "in an effort to control impermissible conduct, the [ordinance] also prohibits conduct which is constitutionally permissible" (clarification added)). Metro may prohibit impermissible sexual touching, but it may not criminalize ***clothed*** dancing in close

proximity to viewers. While the former may be narrowly tailored, the latter is not.

But the foremost reason that this "buffer zone" is not narrowly tailored is because of its impact upon protected expression. In Subsection I(F), Plaintiffs discussed the fact that imposing a significant impact upon the exercise of expressive activities results in a constitutional deprivation. Part of that argument revolves around Justice Kennedy's critical concurrence in **Alameda Books**. There, he provides an example of when his "proportionality" standard has been violated. If a law has a minimal ***two percent impact upon speech and expression-related activities***, it will not be found to be constitutionally wanting. 535 U.S. at 451-53 (Kennedy, J., concurring). Elsewhere, he describes the constitutionally allowable impact as being limited to that which is "trivial." **Id.** at 445.

The law in the Sixth Circuit in regard to this issue *pre*-**Alameda Books** is found in **DLS, Inc. v. City of Chattanooga**, 107 F.3d 403 (6th Cir. 1997), where the appellate court concluded that the effect of a dancer buffer zone must be examined in order to determine whether it "intended to destroy the market for adult cabarets . . . ." **Id.** at 413. However, the court there noted that the plaintiffs had failed to present any type of evidence substantiating any harm being associated with the buffer zone at issue there. **Id.** at 413. Here, however, Plaintiffs presented detailed evidence substantiating just such drastic consequences.

The Affidavit of Brian Franson, Ex. E to Supp. Brief, Aug. 4, 2004; Apx. I) attaches as Exhibit 2 thereto a diagram of the *PT's* club, and demonstrates the effect that the buffer zone would have on that

establishment. The areas in green are where entertainers perform, and the red hatching are all of the areas of the club where -- if entertainers were performing in the green areas -- customers could ***not*** be located pursuant to the requirements of the six foot buffer zone. Franson Aff., ¶'s 7-10; Ex. E to Supp. Brief, Aug. 4, 2004; Apx. I.

A simple review by this Court of Ex. 2 to Mr. Franson's affidavit well-illustrates that the dissemination of this form of ***clothed*** expression will be ***significantly*** reduced -- if not completely obliterated - - if the provisions of § 111.35(B) can be enforced. Either, there is little-to-no space left in the club for customers to locate when entertainers are utilizing the stage areas, or if customers are using all of the floor space currently available to them, there is ***no*** space left ***anywhere*** in the club for entertainers to perform. *Accord* Franson Aff., ¶'s 12 and 13, Ex. E, to Supp. Brief, Aug. 4, 2004; Apx. I.

A federal district court has addressed these types of concerns in regard to a ten foot buffer zone in the case of **J.L. Spoons, Inc. v. City of Brunswick**, 49 F.Supp.2d 1032 (N.D. Ohio 1999), and found this type of evidence sufficient to justify the entry of a preliminary injunction to preclude enforcement of such

a buffer zone. Id. at 1046.[30] The same result was warranted here.

I. THE RESTRICTIONS CONTAINED IN CHAPTER 111 ARE SUBJECT TO STRICT CONSTITUTIONAL SCRUTINY AND DO NOT PASS MUSTER UNDER THAT STANDARD.

For the reasons set forth above, the challenged provisions of Chapter 111 are subject to strict scrutiny. Either, they are subject to that level of review in-and-of-themselves, or because they do not satisfy the O'Brien standards, they must be subject to strict constitutional scrutiny. The restrictions as contained in Chapter 111, however, do not pass muster under that heightened standard because they are certainly not the "least restrictive means" available which would be necessary in order to further a compelling governmental interest. Even if "adverse secondary effects" could be used as a basis to justify such regulations, there are certainly a myriad of less restrictive means available which would not so adversely impact upon the engagement of speech and expression-related activities. Zoning laws and

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[30] The district court in J.L. Spoons also observed that the two foot stage height requirement rendered the buffer zone duplicative and therefore most likely unconstitutional. J.L. Spoons, at 49 F.Supp.2d at 1045-46 (". . . if performers already must remain on a stage that is two feet high, it is especially difficult to see how the ten-foot buffer zone is narrowly tailored to the City's interest in preventing crime and disease"). Given the fact that § 111.36(B) contains a similar (albeit eighteen inch) stage height requirement, the buffer zone fails the narrow tailoring component of O'Brien for this additional reason.

prohibitions against sexual conduct and contact are only a few such examples. Because Chapter 111, however, has such a drastic impact upon protected expression, it does not satisfy the requisites of strict scrutiny which the Kentucky Constitution requires.

II. THE CIRCUIT COURT ERRED IN RULING THAT THE PLAINTIFFS LACKED STANDING TO RAISE A NUMBER OF CONSTITUTIONAL CHALLENGES.

Plaintiffs challenged a number of terms contained in Chapter 111, including the critical definitions therein, as being impermissibly vague. Brief, March 5, 2004; Apx. R, pp. 41-46. Yet, the circuit court concluded that Plaintiffs lacked standing to challenge the definitions under § 111.02 as to what would constitute an "adult entertainment establishment because Plaintiffs ***admittedly*** qualify as such establishments." R. Vol. VII, pp. 942-62; Apx. A, p. 13. Respectfully, Plaintiffs never "admitted" any such thing.

In fact, Plaintiffs' complaint asserts only that "***Defendant contends*** that Plaintiffs are subject to the regulatory provisions of the Ordinance. . . ." Complaint, ¶ 17; R. Vol. I, pp. 1-44. *See also* Complaint, ¶ 24 (same allegation). Paragraph 21 of the complaint further asserts that two entertainers, despite wearing clothing covering more than required in the Ordinance, received citations for violating Chapter 111 and "are now subject to criminal penalties." The paragraph also states that this action "was taken despite Metro's representations to Division 6 [the circuit court] that the regulatory provisions would ***not*** apply to entertainers dressed in such a

fashion." (Emphasis and clarification added). Accordingly, Plaintiffs have not "admitted" that they "qualify" as such establishments, and because the definitions of the Ordinance are so central to the enforceability of its provisions, the circuit court's ruling should not stand until these issues are addressed and resolved. The circuit court also concluded that Plaintiffs lacked standing to challenge the prohibition of minors as set forth in § 111.17 (Plaintiffs having raised this argument in Apx. S, pp. 18-24), stating that the rights of minors "are not before this Court. . . ." R. Vol. VII, pp. 942-62; Apx. A, p. 9. This conclusion is erroneous for two reasons. First, the prohibition that Plaintiffs challenged, the violation of which is subject to a civil fine, imprisonment, and license suspension and/or revocation (*see, e.g.*, § 111.99 and § 111.43), applies to the "***operator***," and ***not*** the minor. *See* § 111.17(a) ("an ***operator or employee*** of an adult entertainment establishment shall not permit a person under eighteen (18) years of age to be employed by or to enter the establishment") (emphasis added). Consequently, Plaintiffs are not asserting the rights of minors; they are asserting ***their own rights*** to not be subject to prosecution under an ordinance provision that directly applies penalties to ***them***. Second, Plaintiffs are clearly entitled to assert standing of their patrons.[31]

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[31] *See, e.g.*, **Connection Distributing Co. v. Reno**, 154 F.3d 281, 289 n.6 (6th Cir. 1998), *cert. denied*, 526 U.S. 1087 (1999) (adult entertainment magazine had standing to assert First Amendment rights of its advertisers and readers). *See also* **Hang On, Inc. v. City of Arlington**, 65 F.3d 1248, 1252 (5th Cir. 1995) (adult cabaret has standing to assert the rights of entertainers who perform there); **Craig v. Boren**, 429 U.S. 190, 192-97 (1976) (seller of beer had standing to argue that a state statute violated

Because of these erroneous standing rulings, the circuit court never addressed the ***merits*** of these claims and, consequently, its decision should therefore be reversed.

III. THE CIRCUIT COURT ERRED IN DISMISSING THE ACTION WITHOUT ADJUDICATING NO LESS THAN SIX OF THE PLAINTIFFS' PRELIMINARY INJUNCTION ARGUMENTS.

Plaintiffs raised the following arguments in their various briefings which the circuit court simply failed to address in its ruling; each of which was sufficient in-and-of itself to warrant the denial of summary judgment in favor of the Defendant. These include:

- The inspection provisions as contained in § 111.39 violated the doctrine of unconstitutional conditions. Plaintiffs raised this issue in their Brief filed March 5, 2004; Apx. R, pp. 48-52.[32] The circuit court failed to

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its customers' equal protection rights); and Carey v. Population Serv. Int'l, 431 U.S. 678, 682-84 (1977) (mail-order retail business engaged in the sale of non-medical contraceptives had standing to assert that a state law prohibiting the distribution of such materials by anyone other than a licensed pharmacist violated its customers' substantive due process rights to use such devices).

[32] Because the circuit court never even addressed these various matters, Plaintiffs will not substantively discuss them in detail here, but rather refer this Court to the sections of the various memoranda in the record where they were extensively commented upon for the detailed arguments as to why these provisions are unconstitutional. Nevertheless, Plaintiffs will in footnote form,

rule on this issue, even though it noted in its Dec. 14 Order this argument. R. Vol. VII, pp. 942-62; Apx. A, pp. 7-8.

- The no direct "tipping" provision of § 111.35(C) violated the right of liberty and the right of freedom of speech. Supp. Brief, Aug. 4, 2004; Apx. S, pp. 64-69.[33] While the circuit court concluded that this ordinance provision was not vague (R. Vol. VII, pp. 942-62; Apx. A, pp. 16-17), ***Plaintiffs had made no such vagueness challenge***.

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provide very brief references to the applicable authorities which support the unconstitutionality of these provisions. On the specific issue regarding the doctrine of unconstitutional conditions, *see*, *e.g.*, **G&V Lounge, Inc. v. Michigan Liquor Control Commission**, 23 F.3d 1071, 1077 (6th Cir. 1994) (government cannot condition the receipt of a benefit, such as a license, upon the agreement to refrain from exercising one's constitutional rights – here the rights under Ky. Const. § 10 against warrantless searches); and **44 Liquor Mart, Inc. v. Rhode Island**, 517 U.S. 484, 513 (1996) (same).

[33] In regard to the violation of the entertainers' liberty interest, the most relevant authorities include **Lawrence v. Texas**, 539 U.S. 558, 564 (2003) (court referring to the "broad statements" of the substantive reach of liberty under the Due Process Clause, and that liberty "presumes an autonomy of self that includes freedom of thought, belief, [and] expression. . . "); and **Allgeyer v. State of La.**, 165 U.S. 578, 589 (1897) (liberty includes the right "to live and work where he will; to earn his livelihood by any lawful calling; [and] to pursue any livelihood or avocation. . .") (clarifications added).

- The entertainment "buffer zone" as set forth in § 111.35(B) violated the right of liberty. Supp. Brief, Aug. 4, 2004; Apx. S, pp. 73-75.[34]

- The licensing scheme of Chapter 111 is unconstitutional because it does not maintain the status quo pending judicial determination. Brief, March 5, 2004; Apx. R, pp. 32-34.[35]

- The licensing scheme of Chapter 111 does not contain the requisite procedural guarantees because it does not require Metro to initiate judicial review and to carry the burden of proof once in court. Brief, March 5, 2004; Apx. R, pp. 34-38.[36]

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[34] *See* n. 33, *supra*. In addition, the Court in **Lawrence** noted that "[f]reedom extends beyond spacial bounds." 539 U.S. at 562.

[35] *See* **Nightclubs**, 202 F.3d at 894; **Deja Vu of Nashville**, 274 F.3d at 400 (the status quo must be preserved pending a final judicial determination on the merits); **T.K.'s Video, Inc. v. Denton County**, 24 F.3d 705, 708 (5th Cir. 1994) (the government cannot regulate an existing business during the licensing process); and **Freedman v. Maryland**, 380 U.S. 51 (1965) (for a law which effectuates a prior restraint on expression to pass muster under the First Amendment, it must, among other things, provide that any restraint prior to judicial review can be imposed only for a specified brief period of time during which the status quo must be maintained).

[36] *See* **Freedman** 380 U.S. at 58-60 (the government must bear the burden of going to court to suppress speech and must bear the burden of proof once in court); and **Cathy's Tap, Inc. v. Village of Mapleton**, 65 F.Supp.2d 874, 889-90 (C.D. Ill. 1999) (licensing scheme of adult businesses must contain the **Freedman** requirement that the government initiate judicial review and bear the burden of proof once in court).

- Metro cannot engraft a dancer buffer zone and "no tip" provision, because Chapter 111 already prohibits both full nudity and "topless" entertainment, which has been recognized by the courts as being the "*de minimis*" restriction to satisfy the narrow tailoring component of intermediate scrutiny. Supp. Brief, Aug. 4, 2004; Apx. S, pp. 24-29.[37]

Because the circuit court did not adjudicate any of these critical constitutional issues, because Plaintiffs' arguments on these matters are well taken, and

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[37] *See* **G.M. Enterprises, Inc. v. Town of St. Joseph**, 350 F.3d. 631, 637-38 (7th Cir. 2003) (ordinances prohibiting nude and "topless" dancing in an establishment licensed to sell alcoholic beverages, prohibiting nude and topless dancers from having any physical contact with any other person during a performance, and imposing a dancer/patron buffer zone, were constitutional because they did not prohibit nude dancing (unlike Chapter 111), and the entertainment was not effected because "if all dancers choose to wear *de minimis* clothing necessary to cover all 'specified anatomical parts' then neither the physical proximity nor alcohol prohibition requirement are implicated"); **Kentucky Restaurant Concepts**, 209 F.Supp.2d at 682 (basically the same); and **R.V.S., L.L.C. v. City of Rockford**, 361 F.3d 402, 413-16 (7th Cir. 2004) (city's attempt to regulate entertainment establishments which provided ***clothed*** entertainment (such as Chapter 111 now does) was unconstitutional because, in utilizing Justice Kennedy's approach in **Alameda Books**, as a "direct restriction on erotic expression speech fares worse under the Ordinance than it did under the laws at issue in similar cases," with the court further noting that the ordinance did not apply to nude dancing or other forms of nude entertainment, and that the "uniqueness of the Ordinance is that it removes nudity from the calculus and seeks to regulate clothed individuals"). Here, however, this Ordinance precludes nude entertainment but still then regulates clothed expression.

because each and every one of these claims was sufficient to defeat the entry of summary judgment on behalf of the Defendant, the decision below should be reversed, with instructions for the circuit court to consider and resolve these various claims.

IV. THE CIRCUIT COURT ERRED IN DISMISSING THE ACTION WITHOUT AFFORDING THE PLAINTIFFS THE OPPORTUNITY TO LITIGATE THEIR "AS APPLIED" CHALLENGE TO THE "SECONDARY EFFECTS" JUSTIFICATION FOR THE ENACTMENT OF THE ORDINANCE.

One of the challenges brought by Plaintiffs was that Chapter 111 was "not enacted upon a proper basis, nor supported by competent and material evidence. . . ." Complaint, Ex. D, ¶ 27(u); R. Vol. I, pp. 1-44. As the Supreme Court noted in **Renton**, the enactment of at least *zoning* ordinances directed at "adult" businesses could be justified by the "secondary effects" of such establishments (*i.e.*, the causing of neighborhood crime, decreases in property values, and the increasing of urban blight). 475 U.S. at 47. Chapter 111 was certainly enacted upon such purported concerns. *See* Apx. B, § 111.01. Yet, assuming, *arguendo*, that irrespective of the matters discussed in Subsections I(B) and (E) above (that this doctrine cannot be utilized under the Kentucky Constitution to potentially justify the enactment of restrictions like those that are found in Chapter 111), this Court nevertheless decides that "Federal" intermediate scrutiny is the appropriate standard to apply, Plaintiffs certainly have the right to ***challenge***

Metro's assertion that its Ordinance is justified upon a concern of adverse secondary effects.

First, the Court observed in **Pap's II**, where it extended – in a plurality fashion – application of the secondary effects doctrine to anti-nudity laws:

> "Here, Kandyland [the plaintiff there] has had ample opportunity to contest the council's findings about secondary effects -- before the council itself, throughout the state proceedings, and before this Court. Yet to this day, ***Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings***."

Pap's II, 529 U.S. at 298 (emphasis and clarification added).

Second, in **Alameda Books**, the plurality opinion authored by Justice O'Connor noted that in attempting to justify restrictions on expression, a municipality can't "get away with shoddy data or reasoning," and that its "evidence must fairly support the municipality's rationale for its ordinance." 535 U.S. at 438-39. Further, the Court held that:

> "If plaintiffs ***fail to cast direct doubt*** on this rationale, ***either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings***, the municipality meets the standard set forth in **Renton**. If plaintiffs ***succeed in casting doubt on a municipality's rationale in either manner***, the burden shifts back to

> the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance."

Id. at 438-39 (clarification and emphasis added).

While these Plaintiffs raised such a challenge as to the evidentiary justification for the enactment of Chapter 111 and the amendments thereto in their complaint, this matter was ***not*** at issue in the three pending motions. Indeed, Plaintiffs pointed that out to the circuit court. *See* Plaintiffs' Response to Motion for Summary Judgment, R. Vol. III, pp. 433-49, at pp. 1-2. Nevertheless, the court granted complete summary judgment to the Defendant and never permitted Plaintiffs to factually litigate their secondary effects challenge. ***More importantly, the circuit court actually "cleansed" the record in order to insure that this factual issue would not be ripe for consideration in the pending motions.***

When Metro filed its Composite Reply in Support of its Motions for Summary Judgment and to Dissolve, and in Opposition to the Plaintiffs' Motion for Temporary Injunction, it raised specific arguments in regard to its evidentiary "justification" for enacting Chapter 111, and submitted certain affidavits in support thereof. Because Metro was then raising new arguments for the first time in its reply, Plaintiffs filed a motion to strike the composite reply. R. Vol. VII, pp. 899-910; Apx. L. Pursuant to that motion, the circuit court initially granted the alternative relief requested, which was the ability of Plaintiffs to complete certain depositions (which were scheduled for

October 18-21, 2004[38]), and to then file a sur-reply brief with necessary counter-affidavits. R. Vol. VI, pp. 897-98; Apx. M.

Defendant then filed a motion for clarification of that order. R. Vol. VII, pp. 918-24. The circuit court then entered an additional Order – ***issued by agreement of the parties*** – stating that the composite reply was to be stricken, and further ordering that Metro was to file a "new Reply ***which eliminates reference to the affidavits filed in the stricken reply***. . . ." R. Vol. VII, pp. 933-34; Apx. N (emphasis added). The court also ordered, again pursuant to the agreement of the parties, that ***Plaintiffs*** would strike "Exhibit C" of their exhibit packet in support of their Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary [sic] Restraining Order. **Id.**

"Exhibit C," which was stricken, was the affidavit of Plaintiffs' secondary effects expert, Dr. Daniel Linz, with supporting evidentiary materials.[39] Apx.Q.

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[38] The various deposition notices and accompanying expert witness interrogatories are found as Apx. P. No discovery was, however, taken before the circuit court entered summary disposition.

[39] In addition, during the pendency of these motions, this Court issued its decision in **Jameson v. Commonwealth**, No. 2003-CA-000967-DG, 2004-WL-1752597 (Ky. Ct. App. Aug. 6, 2004), *motion for discretionary review granted*, which dealt with such an evidentiary challenge. This led to Plaintiffs filing a second supplemental brief for the purpose of demonstrating that full summary judgment could not be justified (even if the court disagreed with every contention raised by the Plaintiffs in the

Subsequently, Judge Ryan entered an amended order (R. Vol VII, pp. 937-38; Apx. O) which clarified what was being stricken, and required Metro to file a "new Reply which ***eliminates reference to the secondary effects affidavits filed in the stricken Reply***. . . ." (New language underlined).

Accordingly, the court sanitized the record to insure that the evidentiary challenge to the secondary effects basis of Chapter 111 would not be at issue in the pending motions, yet it then nevertheless granted virtually complete summary judgment to the Defendant without ever affording the Plaintiffs the opportunity to litigate that claim.

If Plaintiffs were to have successfully challenged the secondary effects justification for the enactment of Chapter 111 at trial under **Pap's II** and **Alameda Books**, the entire ordinance would be ***invalid***.[40] Given

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pending motions), because Plaintiffs could submit at trial virtually the same type of evidence which this Court in **Jameson** found to have rebutted the supposed "secondary effects" basis for enacting the ordinance there. Attached thereto was trial testimony from a federal district court action in Louisville involving some of these same Plaintiffs, and exhibits that were previously entered in that action establishing a lack of connection between a number of the "cabarets" in town and adverse secondary effects. Testimony was also attached which concerned the lack of disease transmission in these type of establishments. R. Vol. IV, pp. 588-98; Apx. T.

[40] *See, e.g.*, **Alameda Books**, 535 U.S. at 439 (if Plaintiffs "succeed in casting doubt on a municipality's rationale," the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance); and at 452 (if the assumptions that these types of

the record originally submitted by the Plaintiffs below, and more importantly the lower court's subsequent cleansing thereof, it was improper to dismiss Plaintiffs' entire lawsuit without affording them the opportunity to litigate their claim that Metro did not have a sufficient evidentiary basis to enact Chapter 111.

V. THE CIRCUIT COURT SHOULD HAVE ENTERED A TEMPORARY INJUNCTION AND SHOULD NOT HAVE LIFTED THE RESTRAINING ORDER.

For the same reasons that a reversal of Defendant's partial grant of summary judgment is warranted, the circuit court's denial of Plaintiffs' motion for temporary injunction also warrants reversal as such an injunction was necessary to prevent any further irreparable harm to Plaintiffs' freedom of expression rights. Plaintiffs established the elements required for the issuance of a temporary injunction pursuant to CR 65.04: (1) whether the Plaintiff has shown a probability of irreparable injury; (2) whether the public interest will be harmed, or whether the injunction will merely be to maintain the status quo; and, (3) whether a substantial question has been presented. **Maupin v. Stansbury**, 575 S.W.2d 695, 699 (Ky. App. 1978).

Plaintiffs clearly showed a probability of irreparable injury as they were being, and would continue to be, deprived of their right to free expression under the Kentucky Constitution if an

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"adult" establishments engender secondary effects "can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny") (Kennedy, J., concurring).

injunction was not issued. Any infringement of expressive rights, for even minimal periods of time, constitutes irreparable harm under the federal constitution, **Elrod v. Burns**, 427 U.S. 347, 353 (1976), and nothing is different under the State Constitution. **James**, 63 S.W.3d at 605 ("Restraining free speech constitutes immediate and irreparable harm, if unauthorized"). Moreover, the public interest would not have been harmed by an injunction as "it is always in the public interest to prevent the violation of a party's constitutional rights." **G&V Lounge, Inc.**, 23 F.3d at 1079, *citing* **Gannett Co., Inc. v. DePasquale**, 443 U.S. 368, 383 (1979). In addition, the injunction would merely have preserved the status quo. Finally, Plaintiffs presented substantial questions on the merits of their constitutional challenges.

CONCLUSION

Plaintiffs respectfully request this Honorable Court to reverse that portion of the decision of the circuit court entered on March 5, 2004, which partially granted Defendant's motion for summary judgment and partially denied the Plaintiffs' motion for temporary injunction. This Court should hold Chapter 111 to be infirm under the Kentucky Constitution, or remand for full consideration of Plaintiffs' claims.

Dated: March 3, 2006

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**Pending admissions *Pro Hac Vice*

Paul S. Gold, Attorney for Blue Movies, Inc., Pure Pleasure Mega Center, LLC, Taylor Boulevard Theatres, Inc., and Win Place and Show Bar, Inc.

H. Louis Sirkin***, Attorney for Blue Movies, Inc., Blue Sky Video, Inc., Cam I, Inc., Pure Pleasure Mega Center, LLC, Taylor Boulevard Theatres, Inc., TBC, Inc., and Win Place and Show Bar, Inc.

***Admitted *Pro Hac Vice*

C. Michael Hatzell, Attorney for Blue Sky Video, Inc., Cam I, Inc., Danny's Inc., Entertainment Enterprises, Inc., Gold Coast, Inc., Hayes Entertainment, Inc., LLL, Inc., Phat's Bar & Grill, Inc., Riverview Entertainment, Inc., South Dixie Entertainment, Inc., TBC, Inc., Teddy's Inc., Thorobred, Inc., and Tinsley's Central Bar, Inc.

Ronald L. Cook and David S. Stevenson, Attorneys for Foxy Lady, Inc.

E. Brian Davis, Attorney For American Pride VI, Inc.

APPENDIX I

COMMONWEALTH OF KENTUCKY
SUPREME COURT

[Filed November 2, 2007]

CAM I, INC. D/B/A PRESTON VIDEO, ET AL.	)
MOVANTS	)
vs.	)
LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT	)
RESPONDENT	)

MOTION FOR DISCRETIONARY REVIEW

On Appeal From The Judgment Of The
Commonwealth of Kentucky Court of Appeals
Case No. 2005-CA-000085-MR;
Case No. 2005-CA-000090-MR;
Case No. 2005-CA-000091-MR;
Case No. 2005-CA-000092-MR;
Case No. 2005-CA-000100-MR;
Case No. 2005-CA-000113-MR;
Case No. 2005-CA-000176-MR;

Comes the Movants, by counsel, and pursuant to CR 76.20, hereby submit their Motion for Discretionary Review:

DESIGNATIONS AND STATEMENTS

(a) The Movants are as follows:

Cam I, Inc., d/b/a *Preston Video*;
Blue Movies, Inc. d/b/a *Love Boutique*;
Blue Sky Video, Inc.;
Berry Boulevard Entertainment, Inc., d/b/a *The Adult Toy Store*;
American Pride VI, Inc., d/b/a *Lion's Den Adult Superstore*;
Taylor Boulevard Theatre, Inc., d/b/a *Erotic Touch*;
TBC, Inc., d/b/a *Metro Station*;
Danny's Inc., d/b/a *Thorobred II*;
Entertainment Enterprises, Inc., d/b/a *The Godfather*;
Gold Coast, Inc., d/b/a *Thorobred III*;
Hayes Entertainment, Inc., d/b/a *Thorobred IV*;
LLL, Inc., d/b/a *Greenlight Lounge*;
Phat's Bar & Grill, Inc., d/b/a *Phat's Bar & Grill*;
Riverview Entertainment, Inc., d/b/a *Thorobred VI*;
South Dixie Entertainment, Inc., d/b/a *Thorobred VII*;
Kentucky Restaurant Concepts, Inc. d/b/a *PT's Showclub*;
Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*;
Teddy's Inc., d/b/a *Thorobred V*;
Thorobred, Inc., d/b/a *Thorobred Lounge*;
Foxy Lady, Inc., d/b/a *Foxy Lady Gentlemen's Club*;
Tinsley's Central Bar, Inc., d/b/a *Bear Necessities, Inc.*; and

Win Place and Show Bar, Inc., d/b/a *Win, Place & Show Bar*.

All Movants are jointly represented by C. Michael Hatzell of the law firm of Hatzell & Groves, 704 One Riverfront Plaza, Louisville, Kentucky, 40202.

Of counsel for the Movants are H. Louis Sirkin, Jennifer M. Kinsley, and Scott Ryan Nazzarine of the Law Firm of Sirkin, Pinales & Schwartz LLP, 105 West Fourth Street, Suite 920, Cincinnati, Ohio 45202; Frank Mascagni, III, and Paul S. Gold, 701 West Jefferson Street, Louisville, Kentucky 40202; and Bradley J. Shafer of Shafer & Associates, P.C., 3800 Capital City Blvd., Suite 2, Lansing , Michigan 48906.

The Respondent in this case is the Louisville/ Jefferson County Metro Government. Respondent is represented by N. Scott Lilly, William P. O'Brien, and Winston King, Assistant County Attorneys, 531 Court Place, Suite 1001, Louisville, Kentucky 40202 and by Scott D. Bergthold, Law Office of Scott D. Bergthold, PLLC, 8052 Standifer Gap Road, Suite C, Chattanooga, Tennessee, 37421.

(b) The final disposition of the Court of Appeals, a copy of which is being filed with the instant Motion, was an Opinion Affirming in Part and Reversing in Part, which was rendered October 5, 2007.

(c) No supersedeas bond or bail on appeal has been executed.

(e) The Movants state that they do not have a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

(f) Movants are not aware of any other party to the proceedings having any petition for rehearing or motions for reconsideration pending in the Court of Appeals.

MATERIAL FACTS

Movants are various businesses located in and around the Louisville/Jefferson County area which are either: (a) retail facilities that present, sell and rent to the consenting adult public a variety of presumptively protected non-obscene but sexually explicit expressive materials and/or (b) liquor-licensed establishments (except for Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*, which does not have a liquor license), which present to the consenting adult public a variety of female exotic performance dance entertainment where entertainers perform at times fully clothed, at times "topless," and at other times fully nude.

Respondent Louisville/Jefferson County Metropolitan Government ("Metro") is the governmental and law-making body that was formed in January 2003 when the City of Louisville, Kentucky and Jefferson County, Kentucky merged into one governmental entity.

On March 1, 2004, Metro enacted Ordinance No. 21, Series 2004, which amended Chapter 111 of the Metro Government Code of Ordinances ("Chapter 111," or simply the "Ordinance;" a copy of which is found as Apx. B). In general, the Ordinance requires that the "principal owners" or "operators" of defined "adult entertainment establishments" must obtain a license from the Director of Inspection, Permits and Licenses (the "Director") as a condition to operating, and that

all employees of such establishments must also obtain a license prior to working in such establishments (§§ 111.36-111.38 and 111.42-111.43); it provides for the denial of license applications and for the suspension and revocation of licenses for numerous reasons (§ 111.43); it requires a $1,000.00 annual licensing fee, presumably for the "principal owners" and "operators," and a $25.00 per year fee for employee licenses (§§ 111.41 and 111.42(B)); it precludes any form of live nude entertainment, or even "topless" dancing, and requires entertainers to wear at all times at least "pasties and g-strings" (§ 111.35(A)); it precludes establishments presenting such clothed dancing from having a liquor license (§ 111.3); it prohibits anyone under the age of eighteen from entering such establishments, even though no true live "adult" entertainment is presented as a result of the nudity prohibitions (§ 111.17); it precludes licensing of individuals convicted of "specified criminal activities," which include, for example, simple drug possession offenses (§§ 111.02; 111.36(B)(2)(b) and (6); 111.38(A)(4); and 111.42(B)); it prohibits such establishments from operating between 1:00 a.m. and 9:00 a.m. on any day (§ 111.18) (referred to as the "hours of operation" restrictions); it prohibits entertainers while "semi-nude" (*i.e.*, while clothed) from receiving any pay or gratuity directly from a patron (§ 111.35(C)), and further requires that such entertainers remain at least six feet away from any patron and perform only on a fixed stage at least eighteen inches above the floor (§ 111.35(B)); and it provides for penalties for violating the Ordinance–in addition to license suspension and/or revocation–which can include civil fines between $100.00 to $1,000.00, a misdemeanor conviction (punishable by a fine of not less than $250.00 nor more than $500.00, or

imprisonment not to exceed ninety days, or both), and "remedial civil actions" brought by the licensing authorities (§ 111.99).

On March 5, 2004, Movant Kentucky Restaurant Concepts, d/b/a PT's ("PT's"), and another party, Blue Movies, Inc., d/b/a Love Boutique ("Blue Movies"), filed suit in Jefferson Circuit Court challenging the Ordinance on numerous state constitutional grounds.[1] At the same time as they filed suit, PT's and Blue Movies filed a Motion for Temporary [sic] Restraining Order/Temporary Injunction.

At the commencement of litigation and following oral argument on the date of filing, the circuit court entered a restraining order enjoining Metro from enforcing the Ordinance. The court later clarified that its ruling was actually in the form of a temporary [sic] restraining order. The Movants' Motion for Temporary Injunction was left pending.

Thereafter, Metro removed the case to federal court and Movants then filed a motion to remand. Metro filed a Motion to Dissolve Temporary [sic] Restraining Order/Temporary Injunction while the case was in federal court. The federal court then granted Movants'

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[1] In June and July of 2004, the various other establishments were granted permission to intervene as plaintiffs in the trial court. However, in order to avoid further complications and confusions, all parties who were Plaintiffs or Intervenors in the circuit court and Appellants/Cross-Appellees in the court of appeals will simply be referred to as "Movants" in this document. Similarly, Metro may be referred to as Respondent in this document even when discussing its role as Defendant in the trial court or as Appellee/Cross-Appellant in the Court of Appeals.

motion to remand because the court concluded that it lacked jurisdiction in that all claims raised by the Movants were based on Kentucky constitutional grounds and there were no federal questions presented.

Following the remand, the circuit court "passed to the trial date" the Respondent's motion to dissolve Temporary [sic] Restraining Order/Temporary Injunction. Metro then filed a motion for summary judgment and a supplemental brief in support of its motion to dissolve the temporary restraining order. Movants also filed a supplemental brief in support of their motion for temporary injunction. Pending before the circuit court were therefore: 1) the Movants' Motion for Temporary Injunction; 2) Metro's Motion to Dissolve Temporary [sic] Restraining Order/ Temporary Injunction; and 3) Metro's Motion for Summary Judgment.

On December 14, 2004, the circuit court entered a final and appealable judgment dissolving the restraining order; granting Metro's motion for summary judgment as to all issues except for § 111.36(B)(2)(b) (a requirement of the disclosure of principal owners) and § 111.35(D) (a "no touch" provision); granting Movants' motion for temporary injunction only with regard to those two sections "until further order of this Court;" and denying the remainder of that motion. The circuit court granted virtually complete summary judgment to Respondent Metro: 1) Without permitting the completion of discovery on matters which the court acknowledged, at least at one point, were relevant to the issues in the case; 2) without conducting any evidentiary hearing; 3) without permitting oral argument on any of the then-

pending motions; and 4) after intentionally, and with the consent of the parties, "sanitizing" certain evidence from the record on critical factual issues which the parties acknowledged were not then pending before the court.

The circuit court denied a motion for stay pending appeal, but stayed enforcement of Chapter 111 long enough for the Movants to seek a stay from the Kentucky Court of Appeals. It further ordered the filing of a $25,000.00 bond from each Movant for that short stay period. Movants all timely filed Notices of Appeal in the Court of Appeals, and Metro filed a cross-appeal with regard to the rulings concerning §§ 111.36(B)(2)(b) and 111.35(D). Upon application, the Court of Appeals issued a stay pending appeal and reduced the bond amount to $500.00 per Movant.

After thorough and extensive briefing on all the issues raised, the Court of Appeals on October 5, 2007 issued an Opinion Affirming in Part and Reversing in Part. Applying a *de novo* standard of review of the circuit court's summary judgment rulings, the Court of Appeals essentially ruled in favor of Metro on every possible issue. The Court of Appeals rejected all of Movants' assignments of error and affirmed the Circuit Court's judgment on all issues raised by Movants. The Court of Appeals reversed the Circuit Court on both issues raised by the Respondents in their cross-appeal, finding both the disclosure of shareholders provision (Section 111.36(B)(2)(b)) and the "no-touching" provision (Section 111.35(D)) of the Ordinance to be constitutionally sound.

The Movants now submit this Motion for Discretionary Review to petition this Court to review

and ultimately reverse the Court of Appeals's Opinion on all grounds.

QUESTIONS OF LAW

(1) Whether the Court of Appeals erred in rejecting Movants' argument that, at least in some contexts, the Kentucky Constitution does provide greater protection of individual liberties than its federal counterpart.

(2) Whether the Court of Appeals erred in rejecting out-of-hand Movants' contention that Kentucky courts should look to or at least consider decisions from other jurisdictions (especially to the courts of Pennsylvania, because Kentucky's Constitution relies heavily on Pennsylvania's Constitution and its language) in interpreting and construing the Kentucky Constitution and, in particular, its protections of the principles of free speech.

(3) Whether the Court of Appeals erred in giving too much weight to obviously outdated cases (for example, *Delk v. Commonwealth*, 166 Ky. 39, 178 S.W. 1129, from 1915) for comparison's sake in analyzing the constitutionality *vel non* of the expressive conduct at Movants' businesses.

(4) Whether the Court of Appeals erred in finding that the Ordinance furthers a substantial governmental interest.

(5) Whether the Court of Appeals erred in finding that Chapter 111 is content neutral and unrelated to the suppression of free expression.

(6) Whether the Court of Appeals erred in holding that the Ordinance's various restrictions on speech are no greater than essential. More specifically whether the Court of Appeals erred in holding that:

(a) the impact Chapter 111's prohibition on nudity (Section 111.35(A)) has on free expression is *de minimis*;

(b) the restrictions on operating hours provision (Section 111.18) is constitutional in that it leaves open "ample channels of communication";

(c) the prohibition on alcohol sales at adult businesses (Section 111.30) is not constitutionally infirm; and

(d) the staging requirements mandating that employees who appear "semi-nude" must be on a stage at least eighteen inches from the floor and six feet from any patron are not greater than necessary.

(7) Whether the Court of Appeals erred in holding that the staging requirements mandating that employees who appear "semi-nude" must be on a stage at least six feet from any patron do not infringe upon Movants' reasonable ability to operate.

(8) Whether the Court of Appeals erred in holding that the staging requirements mandating that employees who appear "semi-nude" must be on a stage six feet from any patron and at least eighteen inches from the floor do not violate the freedom of association, especially considering that the Court never addressed the issue of whether this regulations served a

compelling state interest or could be achieved through means significantly less restrictive.

(9) Whether the Court of Appeals erred in separately analyzing each provision of Chapter 111 as individual isolated restriction rather than considering the effects of the Ordinance in the aggregate and the assertion that their combined effect was intended to destroy the market for adult businesses in the area.

(10) Whether the licensing fees contained in Chapter 111 constitute a prior restraint on speech in that the fees are not reasonably correlated with the cost of administering and enforcing the ordinance but are instead a "charge" upon the exercise of First Amendment rights.

(11) Whether the prohibition on direct tipping (Section 111.35(C)) constitutes an undue and unconstitutional economic burden on free speech rights and whether this burden effects content discrimination on Movant's adult businesses.

(12) Whether the Court of Appeals erred in affirming the Circuit Court's decision that Movant's had no standing to challenge Chapter 111 under the vagueness doctrine of the First Amendment.

(13) Whether the Court of Appeals erred in finding that Movant's had no standing to challenge Chapter 111's restrictions on admitting minors.

(14) Whether the Court of Appeals erred in affirming the Circuit Court's decision that Movant's had no standing to challenge Chapter 111's criminal disability provisions.

(15) Whether the Court of Appeals erred in finding (either explicitly or by not addressing the assignment of error) that the Circuit Court adequately and sufficiently addressed all of the issues and arguments properly raised by the Movants at the Circuit Court, including specifically:

(a) that Chapter 111's prohibition on direct tipping and its buffer zone regulations violated Movant's constitutional right to liberty;

(b) that the licensing scheme of Chapter 111 did not maintain the status quo pending a judicial determination;

(c) that Chapter 111 did not contain the requisite procedural guarantees or provide prompt and adequate judicial review for a restraint on expression;

(d) that Metro could not implement a buffer zone and prescribe direct tipping if Chapter 111's prohibition on full nudity and topless dancing are upheld; and

(e) that the inspection provisions (Section 111.39) violated the doctrine of unconstitutional conditions.

(16) Whether the Court of Appeals erred in concluding that Movants' were afforded a sufficient opportunity to litigate the secondary effects issue at the Circuit Court level.

(17) Whether the Court of Appeals erred in holding that Movants did not set forth sufficient evidence to cast direct doubt on Metro's rationale for

the Ordinance and that Respondents submitted evidence to rebut Movant's evidence.

(18) Whether the infirmity of the licensing scheme contained in Chapter 111 invalidates the entire ordinance.

(19) Whether the Court of Appeals erred in reversing the Circuit Court's judgment by finding that the disclosure of principal shareholders provisions (Sections 111.36(B)(2)(b) and 111.02) is not greater than essential to further the alleged governmental interest and is not overly broad.

(20) Whether the Court of Appeals erred in reversing the Circuit Court's judgment by finding that the "no touch" provisions of Chapter 111 (Section 111.35(D)) is susceptible to a reasonable narrowing construction and that it does not apply to expressive conduct.

REASONS WHY THE JUDGMENT BELOW SHOULD BE REVIEWED

In *Commonwealth v. Wasson*, the Kentucky Supreme Court succinctly stated:

> Contrary to popular belief, the Bill of Rights in **the United States Constitution represents neither the primary source nor the maximum guaranteed of state constitutional liberty. Our own constitutional guarantees against the intrusive power of the state do not derive from the Federal Constitution.** The adoption of the Federal Constitution in 1791 was

> preceded by state constitutions developed over the preceding 15 years, and, **while there is, of course, overlap between the state and federal constitutional guarantees of individual rights, they are by no means identical**.
>
> ....
>
> **Both the record of the 1890-91 debates and the opinions of Justices of this Court who were the contemporaries of our founding fathers express protection of individual liberties significantly greater than the selective list of rights addressed by the Federal Bill of Rights**.

842 S.W.2d 487, 492, 494 (1992) (emphasis added).

Furthermore, the Supreme Court in *Wasson* noted that "[a] comparison of the Kentucky Bill of Rights ... demonstrates **unequivocally that the original Kentucky Bill of Rights was borrowed almost verbatim from the Pennsylvania Constitution** of 1790," and that "because of the common heritage shared by the Kentucky Bill of Rights of 1792 and the Pennsylvania Bill of Rights of 1790 [] **[d]ecisions of the Pennsylvania Supreme Court interpreting like clauses in the Pennsylvania Constitution are uniquely persuasive in interpreting our own**." *Id.* at 492, 498 (emphasis added).

Yet, despite these unequivocal and relatively recent statements of the Commonwealth's Supreme Court that protections of civil liberties under the Kentucky Constitution often far exceed their federal counterparts, and that, furthermore, the meanings and applications of the rights guaranteed by the Kentucky

Constitution may be interpreted in light of Pennsylvania's jurisprudence on similar issues, the Court of Appeals in the instant case flatly refused to consider *any* of Movants' persuasive authority from other states (including, significantly, that of Pennsylvania) which shed light on what protections should be afforded to the guarantees of free expression in regard to adult businesses under the Commonwealth's Constitution. Moreover, in order to reject Movants' claims that the Kentucky Constitution provides more protections of free speech rights than does the Federal Constitution, the Court of Appeals referenced Kentucky cases from the early 1900s that prohibited speech "much milder when compared to the 'expressive conduct' offered at [Movants'] businesses,[2] and flatly stated that, if it were not mandated by the baseline protections in the federal First Amendment, the Court would not give any protection at all to Movants' expression. (*See, e.g.*, Opinion at pp. 87-88, 24 n.8).

As such, it is submitted that this Court should review the Court of Appeals's opinion below in order to resolve these issues and to set the record straight on this apparent conflict. It is respectfully submitted, as outlined above, that there is a glaring contradiction between the Supreme Court's unambiguous words in a previous opinion (*Wasson*) and the Court of Appeals's application of these same constitutional principles to the case *sub judice*. Further, it is respectfully

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[2] It is respectfully submitted that this "much milder" speech that apparently justifies the Court of Appeals's rejection of Movants' argument simply would not and could not be criminalized today consistent with *either* the Kentucky *or* Federal constitutions.

submitted that if an opinion of the Supreme Court appears to have direct application to a case in the lower courts, as Movants submit occurred here with the *Wasson* case, the Court of Appeals should follow the opinion of the higher court, thus leaving to the Supreme Court the prerogative of overruling its own decisions if and when it should decide to do so. In short, it is respectfully submitted that this Court should accept review of this case in order to determine if the Court of Appeals improperly disregarded or gave insufficient weight to an earlier (but recent) opinion of the Supreme Court of Kentucky.

Relatedly, it is submitted that this Court should accept the instant petition for discretionary review in order to bring clarity to what appears to be thorough confusion among the courts regarding this issue of profound importance. There are important constitutional issues of free speech, association, and the right to liberty involved in this case which not only affect the parties to the instant appeal, but many businesses and individuals throughout the Commonwealth. Parties in other cases will need guidance, and the lower courts need definitive answers in order to resolve future litigation. Governments of localities, municipalities, and the Commonwealth need to know how far they may go in regulating speech, expressive conduct, and other activities consistent with the Constitution. And, it cannot be emphasized enough, the issues raised herein are *not* limited solely to adult businesses and the like, but will likely affect what the lower court deemed "pure speech"–"speech for which we would send our sons and daughters off to war." For although the applications of regulations to speech in the "outer ambits" or "outer fringes" of "erotic" speech may differ in some cases from the

regulations of so-called pure speech, the interpretation and reach of the Kentucky Constitution and its protections on *all* speech affects potentially everyone in the Commonwealth.

Simply put, it is submitted that this Court should definitively answer the question of how Kentucky's Constitution is to be interpreted with regard to expressive activities and the right to liberty. Are the free speech protections enshrined in Section 8 of the Kentucky Constitution *more* protective than their federal counterparts in the First Amendment, as argued by Movants, as suggested by other states' interpretations of identical constitutional provisions, and as at least implied by this Court in *Wasson*? Or are they "consistent" with one another, protecting identical or nearly identical forms of speech, as held by the Court of Appeals in certain parts of its decision (*See, e.g.*, Opinion at p. 22)? Or, indeed, are the protections in the Kentucky Constitution much *less* stringent than their federal counterparts, meaning that Kentucky Courts will only protect free speech in the area of erotic expression because such legal principles are "foisted upon it" under the Supremacy Clause, as intimated in the Court of Appeals's Opinion at pages 87-88 and 23-24?

It is submitted that the answers to these questions may effectively resolve many of issues raised by Movants and may indeed answer many of the "questions of law" outlined above. Furthermore, with all due respect to the Court of Appeals, their Opinion evinces an open and blatant hostility to the *content* of the speech at issue which, it is submitted, unfortunately and prejudicially colored their analysis of the constitutional principles involved. As such, it is

respectfully submitted that a more objective analysis of the application of constitutional law to the Movants' speech should issue. And, finally, without going into detail regarding each of the "questions of law" presented above, it is simply submitted that, almost without exception, each and every question presents a profound and widely-applicatory issue of constitutional law and interpretation that should be resolved by this Court as the highest authority in the Commonwealth.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant discretionary review in this case.

Respectfully submitted,

/s/ C. Michael Hatzell by SRN
C. Michael Hatzell
Hatzell & Groves
704 One Riverfront Plaza
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(502) 585-3311

Counsel for Movants

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[*Proof of Service omitted in printing this appendix*]

APPENDIX J

SUPREME COURT OF KENTUCKY

2007-SC-0812-D
(2005-CA-0085, 2005-CA-0090, 2005-CA-0091, 2005-CA-0092, 2005-CA-0100, 2005-CA-0113 & 2005-CA-0176)

[Filed April 16, 2008]

CAM I, INC.,	)
D/B/A PRESTON VIDEO, ET AL.	)
	)
MOVANTS	)
	)
V.	)
	)
LOUISIVILLE/JEFFERSON COUNTY	)
METRO GOVERNMENT	)
	)
RESPONDENT	)
	)

JEFFERSON CIRCUIT COURT
NO. 2004-CI-1967

ORDER GRANTING DISCRECTIONARY REVIEW

The motion for review of the decision of the Court of Appeals is granted. While the parties are free to include all preserved issues in their briefs, the Court is particularly interested in any Twenty First

Amendment issues raised by the prohibition on alcohol, as well as the constitutionality of the principal owner disclosure provision and the "no touching" provision.

The Clerk of the Court of Appeals is directed to transfer to the Clerk of the Supreme Court the entire record in this proceeding.

Further briefing shall proceed in conformity with CR 76.12, the appellant's brief to be filed within sixty (60) days of the entry of this order.

ENTERED April 16, 2008.

/s/ Joseph E. Lambert
CHIEF JUSTICE

APPENDIX K

COMMONWEALTH OF KENTUCKY
SUPREME COURT

NO. 2007-SC-000812-D

[Filed June 24, 2008]

CAM I, INC.,	)
D/B/A PRESTON VIDEO, et al,	)
MOVANTS-APPELLANTS	)
	)
v.	)
	)
LOUISVILLE/JEFFERSON COUNTY	)
METRO GOVERNMENT,	)
RESPONDENT-APPELLEE	)
	)

ON APPEAL FROM
THE COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
No. 2005-CA-000085-MR;
No. 2005-CA-000090-MR;
No. 2005-CA-000091-MR;
No. 2005-CA-000092-MR;
No. 2005-CA-000100-MR;
No. 2005-CA 000113-MR;
AND
No. 2005-CA-000176-MR

APPEAL FROM JEFFERSON CIRCUIT COURT
DIVISION SIX (6)
NOW KNOWN AS DIVISION FIVE (5)
CASE NO. 04-CI-01967

BRIEF OF MOVANTS-APPELLANTS AND APPENDICES A - Q IN SUPPORT THEREOF

Certificate of Service Required by CR 76.12(6):

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by UPS Next Day Air with postage prepaid on June 24, 2008: Honorable N. Scott Lilly, Honorable William P. O'Brien, Honorable Scott D. Bergthold, Honorable H. Louis Sirkin, Honorable Bradley J. Shafer, Honorable Allan S. Rubin, Honorable C. Michael Hatzell, Honorable Jeremy A. Rosenbaum, Honorable J. Michael Murray, Honorable Ronald L. Cook, Honorable David S. Stevenson, Honorable E. Brian Davis, Honorable Paul S. Gold, Honorable Stephen P. Ryan, Honorable Jack Conway, and Clerk, Kentucky Court of Appeals.

_____
Frank Mascagni III

INTRODUCTION

Plaintiffs appeal from the Court of Appeals' decision affirming a circuit court's ruling on a challenge brought under the Kentucky Constitution against a Louisville/Jefferson County Metro Government ordinance that provides for the licensing and regulation of "adult entertainment establishments," where the ruling: 1) vacated a previously entered restraining order; 2) denied Plaintiffs' motion for a temporary injunction; and 3) with two small exceptions, granted the Defendants' motion for summary judgment. Plaintiffs further appeal from the Court of Appeals' decision reversing the circuit court's ruling on the two provisions it found to be unconstitutional.

STATEMENT CONCERNING ORAL ARGUMENT

Due to the importance of the constitutional claims at issue in this case, many of which involve matters of first impression related to the interpretation of provisions of the Kentucky Constitution, Plaintiffs respectfully request that oral arguments be heard. Oral argument is particularly warranted because of the inability of the United States Supreme Court to articulate clear and usable standards for the application of analogous provisions of the Federal Constitution in regard to the matters at issue here. Plaintiffs respectfully request 45 minutes to present their arguments in light of: 1) the number and complexity of the constitutional issues that are raised in this action; and 2) the business diversity of Plaintiffs creating certain conflicts of interest among them in regard to the constitutional issues raised here, which will necessitate more than one attorney arguing the positions of the various Plaintiffs.

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STATEMENT OF THE CASE

Plaintiff Kentucky Restaurant Concepts, d/b/a *PT's* ("*PT's*"), operates a liquor-licensed establishment in Louisville which presents to the consenting adult public a variety of female exotic performance dance entertainment where entertainers are at times clothed, at times "topless," and at other times fully nude. *PT's* has been open for business since February, 1997, and it is licensed to remain open and serve alcoholic beverages until 4:00 a.m. Complaint, ¶ 10; Circuit Court Record ("R.") Vol. I, pp. 1-44.

Blue Movies, Inc., d/b/a *Love Boutique* ("*Blue Movies*"), operates a retail facility in Louisville that presents, sells, and rents to the consenting adult public a variety of non-obscene but sexually explicit expressive materials. *Blue Movies* has operated since 1982. Complaint, ¶ 11; R. Vol. I., pp. 1-44.

On March 1, 2004, Defendant Louisville/Jefferson County Metropolitan Government ("Metro") enacted Ordinance No. 21, Series 2004, which amended Chapter 111 of the Metro Government Code of Ordinances ("Chapter 111," or simply the "Ordinance"; Apx. D). In general, the Ordinance requires that the "principal owners" or "operators" of defined "adult entertainment establishments" must obtain a license from the Director of Inspection, Permits and Licenses (the "Director") as a condition to operating, and that all employees of such establishments must also obtain a license prior to working in such establishments (§§ 111.36-111.38 and 111.42-111.43); it provides for the denial of license applications and for the suspension and revocation of licenses for numerous reasons (§ 111.43); it requires a $1,000.00 annual

licensing fee, presumably for the "principal owners" and "operators," and a $25.00 per year fee for employee licenses (§§ 111.41 and 111.42(B)); it precludes any form of live nude entertainment, or even "topless" dancing, and requires entertainers to wear at all times at least "pasties and g-strings" (§ 111.35(A)); it precludes establishments presenting such clothed dancing from having a liquor license (§ 111.3); it prohibits anyone under the age of eighteen from entering such establishments, even though no true live "adult" entertainment is presented as a result of the nudity prohibitions (§ 111.17); it precludes licensing of individuals convicted of "specified criminal activities," which include, for example, simple drug possession offenses (§§ 111.02; 111.36(B)(2)(b) and (6); 111.38(A)(4); and 111.42(B)); it prohibits such establishments from operating between 1:00 a.m. and 9:00 a.m. on any day (§ 111.18) (referred to as the "hours of operation" restrictions); it prohibits entertainers while "semi-nude" (*i.e.*, while clothed) from receiving any pay or gratuity directly from a patron (§ 111.35(c)), and requires that such entertainers remain at least six feet away from any patron and perform only on a fixed stage at least eighteen inches above the floor (§ 111.35(B)); and provides for penalties for violating the Ordinance - - in addition to license suspension and/or revocation - - which can include civil fines between $100.00 to $1,000.00, a misdemeanor conviction (punishable by a fine of not less than $250.00 or more than $500.00, or imprisonment not to exceed ninety days, or both), and "remedial civil actions" brought by the licensing authorities (§ 111.99).

Plaintiffs filed suit on March 5, 2004, challenging the Ordinance on numerous state constitutional

grounds. At the same time, they filed a Motion for Temporary [sic] Restraining Order/Temporary Injunction. The bases of the constitutional attacks against Chapter 111 are set forth in Plaintiffs' complaint (R. Vol. I, pp. 1-44), and the matters at issue in the various motions which resulted in the dismissal of the lawsuit below are found in the Summary and Outline of Constitutional Challenges to Chapter 111. R. Vol. III, pp. 410-30; Apx. E.[1]

At the commencement of litigation and following oral argument on the date of filing, the circuit court entered a restraining order enjoining Metro from enforcing the Ordinance. R.Vol. I, p. 52; Apx. F. The court later clarified that its ruling was actually in the form of a temporary [sic] restraining order. R. Vol. III, pp. 358-61; Apx. J. Plaintiffs' Motion for Temporary Injunction was left pending.[2]

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[1] These arguments can be discerned in detail from Plaintiffs' Brief in Support of Motion for Temporary Injunction ("Brief"), filed March 5, 2004; Plaintiffs' Response to Motion for Summary Judgment (R. Vol. III, pp. 433-49); and Plaintiffs' Supplemental Brief in Support of Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary [sic] Restraining Order ("Supp. Brief"), filed August 4, 2004.

[2] In June and July of 2004, the other Appellants/Counter-Appellees were granted permission to intervene as plaintiffs. Those businesses fell into two categories. First were Cam I, Inc., d/b/a *Preston Video*; Blue Sky Video, Inc.; Berry Boulevard Entertainment, Inc., d/b/a *The Adult Toy Store*; Pure Pleasure Mega Center, LLC; American Pride VI, Inc., d/b/a Lion's Den Adult Superstore; Taylor Boulevard Theatre, Inc., d/b/a *Erotic Touch*; and TBC, Inc., d/b/a *Metro Station*, which are all retail facilities that present, sell and rent to the consenting adult public a variety of non-obscene but sexually explicit expressive

Metro filed a Motion to Dissolve Temporary [sic] Restraining Order/Temporary Injunction (R. Vol. I, pp. 76-89) while the case was in federal court (after Metro had filed a notice of removal but before the federal district court entered an order of remand), and then later filed a motion for summary judgment. R. Vol. II, pp. 148-241. The motion to dissolve was later "passed to the trial date." (Order, R. Vol. III, pp. 347-50; Apx. I). Pending before the circuit court were therefore: 1) Plaintiffs' Motion for Temporary Injunction; 2) Metro's Motion to Dissolve Temporary [sic] Restraining Order/Temporary Injunction; and 3) Metro's Motion for Summary Judgment.

On December 14, 2004, the circuit court entered a final and appealable judgment dissolving the restraining order; granting Defendant's motion for summary judgment as to all issues except for

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materials. Second were Danny's Inc., d/b/a *Thorobred II*; Entertainment Enterprises, Inc., d/b/a *The Godfather*; Gold Coast, Inc., d/b/a *Thorobred III*; Hayes Entertainment, Inc., d/b/a *Thorobred IV*; LLL, Inc., d/b/a *Greenlight Lounge*; Phat's Bar & Grill, Inc., d/b/a *Phat's Bar & Grill*; Riverview Entertainment, Inc., d/b/a *Thorobred VI*; South Dixie Entertainment, Inc., d/b/a *Thorobred VII*; Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*; Teddy's Inc., d/b/a *Thorobred V*; Thorobred, Inc., d/b/a *Thorobred Lounge*; Foxy Lady, Inc., d/b/a *Foxy Lady Gentlemen's Club*; Tinsley's Central Bar, Inc., d/b/a *Bear Necessities, Inc.*; and Win Place and Show Bar, Inc., d/b/a *Win, Place & Show Bar*, all of which are liquor-licensed establishments (except for Taylor Boulevard Theatre, Inc., d/b/a *Deja Vu*, which does not have a liquor license) that present to the consenting adult public a variety of female exotic performance dance entertainment where entertainers perform at times fully clothed, at times "topless," and at other times fully nude. All of these parties are referred to hereinafter simply as "Plaintiffs."

§ 111.36(B)(2)(b) (a requirement of the disclosure of principal owners) and § 111.35(D) (a "no touch" provision); granting Plaintiffs' motion for temporary injunction only with regard to those two sections "until further order of this Court;" and denying the remainder of that motion. R. Vol. VII, pp. 942-62; Apx. C. The circuit court granted virtually complete summary judgment to the Defendant: 1) Without permitting the completion of discovery on matters which the court acknowledged, at least at one point, were relevant to the issues in the case; 2) without conducting any evidentiary hearing; 3) without permitting oral argument on any of the then-pending motions; and 4) after intentionally, and with the consent of the parties, "sanitizing" certain evidence from the record on critical factual issues which the parties acknowledged were not then pending before the court.

Plaintiffs timely filed Notices of Appeal, and Metro filed a cross-appeal regarding the rulings concerning §§ 111.36(B)(2)(b) and 111.35(D). On October 5, 2007, the Court of Appeals issued a 89 page decision, affirming each and every ruling of the circuit court adverse to the Plaintiffs, and reversing the circuit court on the two cross-appeal issues. Apx. A. The Plaintiffs then filed a motion for discretionary review to this Court, which was granted on April 16, 2008. Apx. B. This appeal follows.

ARGUMENT

I. BECAUSE CHAPTER 111 IS INFIRM UNDER THE KENTUCKY CONSTITUTION, THE COURT OF APPEALS ERRED IN AFFIRMING THE CIRCUIT COURT'S RULING WHICH GRANTED NEARLY THE ENTIRETY OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

A. STANDARD OF REVIEW.

The standard of review regarding a grant of summary judgment is:

> [W]hether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law. [ ]Summary judgment is only proper when it would be impossible for the plaintiff to produce any evidence at trial warranting a judgment in his favor. In ruling on a motion for summary judgment, the court is required to construe the record in a light most favorable to the party opposing the motion.

Horne v. Precision Cars of Lexington, Inc., 170 S.W.3d 364, 366 (Ky. 2005) (citations omitted). Moreover, "[t]here is no requirement that the appellate court defer to the trial court since factual findings are not at issue." *Lucchese v. Sparks-Malone, P.L.L.C.*, 44 S.W.3d 816, 817 (Ky. App. 2001). Finally, conclusions of law, which are the rulings at issue here, are subject to "independent *de novo* appellate determination." *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. Ct. App. 2005).

B. THE LICENSING SCHEME OF CHAPTER 111 EFFECTUATES AN IMPERMISSIBLE PRIOR RESTRAINT UPON EXPRESSION.

"A 'prior restraint' exists when speech is conditioned upon the prior approval of public officials." *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 889 (6th Cir. 2000), *overruled on other grounds.*[3] *See also Near v. Minnesota*, 283 U.S. 697, 713 n. 13 (1931). Under federal jurisprudence, "[a]ny system of prior restraints of expression comes to this Court bearing a ***heavy presumption against its constitutional validity***." *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317 (1980) (emphasis added). *Accord James v. Hines*, 63 S.W.3d 602, 606 (Ky. Ct. App. 1998), *appeal dismissed* ("Prior restraint on speech is ***presumptively unconstitutional***") (emphasis added). These limitations upon the prior restraint of speech and expression should be of concern to this Court for the following reasons.

First, this Court has often declared that the State Constitution affords broader protections than the Federal Constitution.[4] This is because:

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[3] Although Plaintiffs' claims were predicated solely upon the Kentucky Constitution, they will cite to federal precedent as state rights cannot fall below the minimum guarantees of rights under the United States Constitution. *The Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 417-18 (Ky. 2005).

[4] *See, e.g., Commonwealth v. Brandenburg*, 114 S.W.3d 830, 835 (Ky. 2003) (court has right to "enhance the protections afforded the citizens of this Commonwealth by the Kentucky Constitution"); *Yeoman v. Commonwealth*, 983 S.W.2d 459, 474 (Ky. 1998) ("privacy rights guaranteed by the Kentucky Constitution exceed those granted by the United States

> Our own constitutional guarantees against the intrusive power of the state do not derive from the Federal Constitution. . . . [W]hile there is, of course, overlap between state and federal constitutional guarantees of individual rights, they are by no means identical. . . . Both the record of the 1890-91 debates and the opinions of Justices of this Court who were the contemporaries of our founding fathers express protection of individual liberties *significantly greater than the selective list of rights addressed by the Federal Bill of Rights*.

Commonwealth v. Wasson, 842 S.W.2d 487, 492, 494 (Ky. 1992) (invalidating the states sodomy law based on privacy grounds) (emphasis added).

Here, Ky. Const. §§ 1, 2, 8 and 26 contain language far broader than the First Amendment. Indeed, the Kentucky Constitution protects the freedom of speech and communication in not one, but two separate provisions. Ky. Const. §§ 1(Fourth) and 8. In addition, there is the broad limitation upon government as set forth in Ky. Const. § 26. This demonstrates that Kentucky has indeed chosen the broadest protections for expression that are possible. Moreover, this Court should not consider the textual difference between the Federal and State Constitutions to be insignificant. Indeed, "each word in the Constitution should be given

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Constitution"); *Dean v. Commonwealth*, 777 S.W.2d 900 (Ky. 1989), *overruled on other grounds* (right of confrontation broader); and *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989) (finding a fundamental right to public education, even though the U.S. Supreme Court had rejected just such an argument).

meaning and effect. . . ." *Hodgkin v. Kentucky Chamber of Commerce*, 246 S.W.2d 1014, 1016 (Ky. Ct. App. 1952). This admonition should be kept in mind when considering the precedent below which discusses the literal differences between the federal and state constitutional provisions at issue.

Second, and more specifically, the ***Pennsylvania*** Constitution has been interpreted to afford extremely broad protections against prior restraints. This is important because a"comparison of the Kentucky Bill of Rights of 1792 and a number of earlier, now defunct constitutions of the leading colonies, ***demonstrates unequivocally that the original Kentucky Bill of Rights was borrowed almost verbatim from the Pennsylvania Constitution of 1790***." *Wasson*, 842 S.W.2d at 492 (emphasis added).

Accordingly, as succinctly stated by this Court, "Decisions of the Pennsylvania Supreme Court interpreting like clauses in the Pennsylvania Constitution are ***uniquely persuasive*** in interpreting our own." *Id.* at 498 (emphasis added). [5]

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[5] *See also Yeoman*, 983 S.W.2d at 473 ("decisions of the Supreme Court of Pennsylvania, when interpreting provisions of the Pennsylvania Constitution similar to that of the Kentucky Constitution, are ***very persuasive*** to the Courts of the Commonwealth and should be given as much deference as any non-binding authority receives") (emphasis added); and Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 Temp. L. Rev. 541 (1989)(influence is remarkable).

At the time of adoption of the Kentucky Constitution, as well as the federal constitution and the constitution of the State of Pennsylvania, there were two philosophical approaches to the freedoms of speech and the press. The more limited was the Blackstone view that freedom of speech meant only freedom from prior restraint. Under Blackstone's view, there could, however, be punishment for the "abuse" of that liberty. The other was a natural rights philosophy advanced in the works of John Locke, which taught that freedom of speech was an "inalienable" natural right that was always retained by the individual, limited only by the fundamental rights of others. A detailed discussion of these competing theories is found in the recent decision of the *Oregon Supreme Court in Oregon v. Ciancanelli*, 121 P.3d 613, 620 (Or. 2005).

It is beyond question that Kentucky has chosen the broadest protections possible by blending these two philosophical approaches into the State Constitution. Certainly, Ky. Const. § 1 contains natural rights attributes (its refers to the "***inalienable*** rights" of men to "freely communicate their thoughts and opinions" (emphasis added)). In addition, in also adopting a Blackstonian approach to these liberties, the Framers drafted Ky. Const. § 8 to protect the "free and full" right to speak, write and print "on any subject," while holding individuals "responsible for the abuse of that liberty."[6]

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[6] The Court of Appeals below was misguided in its ruling in this case by its vehement dislike for adult establishments, very clearly holding that if it were up to the Court of Appeals, this type of expression would be granted no constitutional protections at all. Apx. A, p. 87 ("Simply because United States Supreme Court case

Similarly, it is clear that the framers of the Pennsylvania constitution chose broad protections against prior restraints as well. In *Long v. 130 Market St. Gift & Novelty of Johnstown*, 440 A.2d 517, 525 (Pa. Super. Ct.1982), the Superior Court of Pennsylvania noted that Blackstone's approach had become part of the "bedrock of Pennsylvania's constitutional system," and that under their state constitution, there were two distinct elements to the right of freedom of expression. "The first, ***arguably an absolute right***, guarantees to each citizen the freedom to make public whatever he may choose. *The prohibition against the prior restraint of publication*

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law ***has thrust upon us a mandate that erotic expression deserves at least minimal First Amendment protection***, this does not mean that all activities taking place in such an environment are likewise protected") (emphasis added); and Apx. A, p. 88 ("Without the mandate by federal jurisprudence that we grant such protection, meaning that Kentucky's Constitution can give no lesser protection to this form of alleged expression, it is ***not evident that Kentucky would grant any protection at all to erotic expression if we had the choice***.") (emphasis added). It should be noted that Court of Appeals issued its decision without viewing one item of merchandise or a single performance presented in Plaintiffs' establishments upon which to base its opinion that those forms of expression are not protected.

serves to protect the sanctity of this right."[7] *Id.* (emphasis added).

The Pennsylvania Supreme Court concurs in these comments. In *William Goldman Theatres, Inc. v. Dana*, 173 A.2d 59, 62 (Pa. 1961), the High Court, in addressing the interpretation of the Pennsylvania constitutional right of free expression as a matter of first impression,[8] succinctly held that "it is clear enough that what it was designed to do was to *prohibit the imposition of prior restraints upon the communication of thoughts and opinions*, leaving the utterer liable ***only*** for the abuse of the privilege" *Id.* at 62 (emphasis added). In discussing the renowned Blackstone Commentaries and the prohibition against prior restraints, the Pennsylvania Supreme Court further observed that what Blackstone had recognized as the law of England came to be "an established

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[7] The second distinct element to the right of freedom of expression under the Pennsylvania and Kentucky constitutions is the responsibility "for the abuse of that liberty." The court in *Long* further noted that "[i]t would seem that the right to ***trial by jury . . . protects the sanctity of this more limited right***." *Long*, 440 A.2d at 525 (emphasis added). However, there is no right to trial by jury with regard to the criminal disability provisions of Chapter 111 further discussed, *infra*, which can effectuate an absolute prior restraint upon expression. Rather, the Director, and not a jury, makes the decision that an individual or business is precluded from engaging in protected expression in the Louisville/Jefferson County area. Because the Ordinance does not require a determination by jury of penalties under Chapter 111 (including license suspension and/or revocation), the Ordinance is constitutionally infirm for this additional reason.

[8] As will be discussed further herein, that provision served as the basis for the rights found in Ky. Const. § 8.

constitutional right in Pennsylvania as to both speech and press. . . ."

Accordingly, the Pennsylvania courts have acknowledged the "***arguably . . . absolute right***" to be free from prior restraints. This Court should recognize and indeed follow this "uniquely persuasive" precedent from the State of Pennsylvania.[9] *See also Commonwealth v. Campbell*, 117 S.W. 383, 385-86 (Ky. Ct. App. 1909) (the court of appeals following the Blackstone approach in differentiating between absolute and relative rights).

Therefore, because Chapter 111 is clearly a prior restraint (in that no one can engage in the defined conduct within the county without prior governmental approval from the Director), it is invalid in-and-of itself under the plain language of the Kentucky Constitution. The Court of Appeals was in error in rejecting this argument. Apx. A, p. 53. Yet, an

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[9] Tennessee, whose constitution was also borrowed "***in virtually identical form***" from the Pennsylvania constitution, has also recognized the broad prohibitions against prior restraints (an "arguably absolute right") by directly and liberally quoting from *Long* in *Tennessee v. Marshall*, 859 S.W.2d 289, 293 (Tenn. 1993). That court further observed, in adopting the Pennsylvania approach, that "[t]here is no indication in the journals chronicling the historical development of the Constitutions of Tennessee, nor in any prior Tennessee Supreme Court cases, that the delegates to Tennessee's Constitutional Convention in 1796 intended, when they adopted, ***verbatim***, the language that was contained in Article 9,§ 7 of the Pennsylvania Constitution of 1790, *that such language have any meaning other than that which had been, and continues to be, attributed to it in the context of the Pennsylvania Constitution of 1790.*" *Id.* at 294 (emphasis added).

additional facet of the Ordinance further makes this point.

In order to obtain an adult entertainment establishment license, each principal owner, officer, director, general partner, and "each other person who will participate directly in decisions relating to management of the business" must be identified in the application and must list thereon all convictions for "specified criminal activities as defined in this Chapter. . . ." § 111.36(B)(2)(b) and (6).

An application for an adult entertainment establishment license is to be denied if the "applicant" has been convicted of a "specified criminal activity. . . ." § 111.38(A)(4).[10] In addition, *each and every person employed at an adult establishment must obtain an employee license prior to working -- **even janitors***! *See* generally § 111.40(D) and § 111.42(A). An employee license must also be denied if the Director determines that the employee applicant has been convicted of a "specified criminal activity." § 111.42(B). Interestingly, while this restriction parrots the requirement for club licenses, employee applicants are ***not*** – for whatever reason – obligated to

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[10] These include the crimes of rape, sexual misconduct, indecent exposure, falsifying business records, prostitution, obscenity, engaging in organized crime, and even offenses relating to controlled substances. § 111.02. Such convictions preclude licensing for two years from the date of a conviction for a misdemeanor offense; five years from the date of a felony conviction; and five years from the date of the last conviction of two or more misdemeanor offenses occurring within any twenty-four month period. § 111.02.

disclose any such convictions on their applications. *See, e.g.*, § 111.42(A)(1)-(7).

Any license may be suspended if the licensee "knowingly or recklessly violated or is not in compliance with any section of this chapter. . . ." § 111.43(A). A license may be revoked if the licensee "knowingly or recklessly commits two or more violations specified in this chapter within a 12-month period," § 111.43(B), or for a single instance of certain criminal conduct. § 111.43(C). The fact that a conviction is being appealed "shall have no effect on the revocation of the license. . . ." § 111.43(D). A license revocation is effective for ***one year***. § 111.43(E). All of these sections of Chapter 111, in combination, will be referred to hereinafter as the "***criminal disability provisions***" of the Ordinance.

The circuit court upheld these restrictions, R. Vol. VII, pp. 942-62; Apx. C, pp. 6-7, and held that Plaintiffs did not have standing to challenge them.[11] *Id.* at 7. The appellate court affirmed, also finding a lack of standing. Apx. A, pp. 61-62. However, the criminal disability provisions are unquestionably prior restraints upon expression, and accordingly fail to pass muster under the Kentucky Constitution.

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[11] Plaintiffs have standing because they're required to pay the application fees used to defray the costs of the criminal background checks which facilitate administration of the criminal disability provisions. *See* Section I(C), *infra*. In addition, all "applicants" must forego their privacy rights and provide certain personal information and submit to background check; again conferring standing to challenge these provisions.

First, since prior restraints should not be permitted ***at all*** under the Kentucky Constitution, these provisions are invalid. They disenfranchise certain individuals and businesses from engaging in expression-related activities, and therefore unquestionably effectuate an impermissible prior restraint. Indeed, supreme courts of a number of states have come to the conclusion that these types of criminal disability provisions are constitutionally infirm.[12]

Second, there is also federal precedent that establishes the infirmity of such restrictions. Most telling is the recent Seventh Circuit decision in *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000), where that Circuit succinctly concluded:

> "We know of no doctrine that permits the state to deny to a person First Amendment liberties

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[12] *See, e.g., Perrine v. Municipal Court*, 488 P.2d 648, 652 (Cal. 1971) (ordinance unconstitutional as no showing had been made that persons convicted of specifically articulated sex crimes were "in any way disqualified to participate in the operation of a[n adult] bookstore or likely to abuse the right to do so to promote any criminal propensities that they may still possess") (clarification added); *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272, 288-89 (Colo. 1995); *Seattle v. Bittner*, 505 P.2d 126, 131 (Wash. 1973); and *Alexander v. City of St. Paul*, 227 N.W.2d 370, 373 (Minn. 1975) (holding that the presumptive unconstitutionality of such provisions which effectuated a prior restraint could be overcome only upon a showing that the operation of a business would present a "clear and present danger" of a substantive evil). *See also James*, 63 S.W.3d at 606 ("Prior restraint must be supported by findings that a 'clear and present danger of actual prejudice or an imminent threat' to the defendant is present").

> other than the right to vote solely because that person was once convicted of a crime or other offense."... these license ineligibility provisions ***absolutely disentitle classes of speakers from a category of expression***. They produce a complete ban on certain expression for a disqualified group of applicants who, by definition, wish to speak, and such a drastic measure ***cannot be justified here as narrowly tailored to resist noisome secondary effects***."[13]

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[13] Consequently, criminal disability provisions such as are found in Chapter 111 ***cannot*** be justified upon a concern of "adverse secondary effects" as is the stated purpose of this Ordinance. *See* further discussion in Section IV, *infra*. While the United States Supreme Court has never directly ruled on the validity of these types of disability provisions, a number of its decisions, and in particular those dealing with "adult" entertainment, certainly imply that they would be ruled unconstitutional. *See, e.g., Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 n.2 (Court held that a nuisance abatement padlocking of an adult bookstore for non-speech related activities (prostitution and lewdness) did not constitute an impermissible prior restraint since respondents were "free to carry on their bookselling business at another location," which would not be the case here where the disabled individuals and businesses are precluded from engaging in protected activities anywhere in the County); *Alexander v. United States*, 509 U.S. 544, 551 (1993) (Court concluded that the forfeiture provisions of the federal RICO statute did not violate the First Amendment as it "impose[d] no legal impediment to--no prior restraint on--petitioner's ability to engage in any expressive activity he chooses" (clarification added) whereas Chapter 111 violates this doctrine by imposing an absolute "legal impediment" to constitutionally protected expressive conduct); and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434-42 (2002) (plurality) (Justice Kennedy, in his critical concurring opinion (discussed, *infra*), observed that a municipality may not attempt to address a concern of secondary effects by "suppressing the

228 F.3d at 852-53 (emphasis added, citations omitted).

Here, although the preambles to Chapter 111 do not articulate any reason for engrafting the criminal disability provisions on to the Ordinance (a constitutional failing in-and-of-itself), it is clear that the only basis for these prohibitions could be the conclusion that people who were convicted of crimes in the past would be more likely to engage in such conduct in the future. As is aptly demonstrated above, however, Metro should not be permitted to effectuate such impermissible prior restraints.

C. THE LICENSING FEES ARE UNCONSTITUTIONAL.

The annual fee for an adult entertainment establishment license is $1,000.00. § 111.41. For an employee license, it is $25.00 per year. § 111.42(B). It

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speech itself." To be constitutional, the law must instead "leave the quantity and accessibility of speech substantially undiminished"). *See also Vance*, 445 U.S. at 317 (Prohibition of the future exhibition of films previously found to be obscene found unconstitutional as the future conduct was protected); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (Previous misconduct or prior illegal activity by anti-abortion protesters could not serve as a basis to deprive them of their right to engage in current and future First Amendment activities); *Simon & Schuster, Inc. v. Crime Victims Bd.*, 502 U.S. 105 (1991) (Individuals convicted of heinous crimes, such as murder, could not be deprived of their First Amendment rights to author, publish, and receive royalties from books describing their criminal activities); and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002) ("[T]he prospect of crime" does not justify laws suppressing protected speech).

is clear that the purpose of these fees is, at least in part, to defray the costs of the ***background checks*** necessary to enforce the criminal disability provisions. *See, e.g.*, § 111.42(B) ("Within 20 working days of the application, the Director shall determine whether the applicant has been convicted of a specified criminal activity, as defined in this Chapter"). Given that the criminal disability provisions are infirm for the reasons as set forth above, the license fees are unconstitutional as well.

As a basic premise, a state may not impose a charge upon the exercise of a constitutional right. *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). Nevertheless, under federal analysis, a licensing fee levied upon "adult entertainment establishments" does not excessively burden First Amendment rights "so long as it is imposed as a regulatory measure to ***defray the cost of investigating the license applicant***." *Broadway Books, Inc. v. Roberts*, 642 F.Supp. 486, 493 (E.D. Tenn. 1986).[14] The fee should be

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[14] Whether municipalities can impose a particular licensing fee under federal jurisprudence only against "adult" businesses is now open to question. *See Alameda Books*, 535 U.S. at 445 (Kennedy, J., concurring in the judgment) ("On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. A city may not, for example, impose a content-based fee or tax"). As will be discussed, *infra*, Justice Kennedy's concurring opinion has been determined to be the "holding" of *Alameda Books*. In addition, the protections against prior restraints as embodied in the Kentucky Constitution would also seem to exclude the notion that the engagement in constitutionally protected activities can be made contingent upon the payment of a fee. Accordingly, the fees as set forth in the challenged Ordinance may be unconstitutional in-and-of-them-

as minimal as necessary to meet the cost to the city. *Id.* The rationale for this rule is that "the power to impose a license tax on the exercise of . . . [First Amendment] freedoms is indeed as potent as the power of censorship." *Murdock*, 319 U.S. at 113 (clarification added).

The burden of proving that the fees are necessary to cover the reasonable costs of the licensing scheme *lies with the licensing authority. See, e.g., Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F.Supp.2d 672, 691-92 (W.D. Ky. 2002) (in striking down fees, "municipality bears the burden of presenting evidence that its fee is necessary to defray the cost of administering the regulatory scheme").

If the criminal disability provisions of the Ordinance are unconstitutional, so clearly then are the application/licensing fees, which are specifically predicated upon administering the criminal disability components of Chapter 111. While the circuit court found that Metro had substantiated the amount of these fees by way of affidavit (Apx. C, p. 6), which was affirmed by the Court of Appeals (Apx. A, p. 55), the lower court decisions were, of course, predicated upon the upholding of the criminal disability provisions. If they are infirm, all of the costs associated with administering those provisions – which are indeed the lion's share of the licensing fees – are similarly unjustified, which negates the permissibility of these fees.

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selves, irrespective of the other matters discussed in this subsection.

D. THE INFIRMITY OF THE LICENSING SCHEME INVALIDATES THE ORDINANCE IN ITS ENTIRETY.

Although Chapter 111 contains a severability provision (§ 111.98), the invalidity of the licensing scheme renders the ordinance invalid in its entirety. The district court decision in *Kentucky Restaurant Concepts*, is particularly illuminating as it involved the predecessor adult entertainment establishment ordinance. The court there held that:

> "As a practical matter, however, partial operation of Chapter 111 post-severance is untenable. The Ordinance's basic purpose is to regulate sexually oriented businesses. Its primary method for doing so is its licensing and enforcement scheme. Although the Ordinance's substantive provisions are constitutional, they are actually but minor subsets of the broader licensing requirement. . . . If the City may not deny or revoke licenses - - the fundamental regulatory mechanism upon which the Ordinance is structured - - then enforcement of the Ordinance is impossible."

209 F. Supp.2d at 701. *Accord Artistic Entm't, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1204 (11th Cir. 2003). The same circumstances apply here, and the circuit court should therefore have enjoined the enforcement of the entire Ordinance, or the Court of Appeals should have reversed that holding.

In addition, because the licensing fees are unconstitutional, the entire Ordinance must be enjoined. *See, e.g., Ellwest Stereo Theater, Inc. v.*

Boner, 718 F.Supp. 1553, 1574-75, and 1581-82 (M.D. Tenn. 1989) (invalidation of numerous provisions of an adult business licensing ordinance – including the fee provision – rendered it impossible to sever, thereby requiring the entire ordinance to be enjoined); and *City of Chicago Heights v. Public Service Co.*, 97 N.E.2d 807, 811 (Ill. 1951) (invalidation of licensing fees associated with an ordinance regulating the location and construction of poles, wires, and main electrical lines in streets and other public places rendered the entirety of the ordinance unconstitutional, as the impermissible fee provisions were not severable in that the duties imposed upon the municipal agency "must be performed without reimbursement to the City because the license and permit fees provided for are excessive and void"). Here, Metro certainly did not intend the ***County*** to pay for the costs of administering this Ordinance, and since the fee provisions are therefore infirm, so is the entirety of Chapter 111.

E. THE ANTI-NUDITY PROVISION AND THE ARTICULATED BASIS FOR THE ENACTMENT OF THE ORDINANCE VIOLATE THE KENTUCKY CONSTITUTION.

Section 111.35(A) provides that it is a violation of the Chapter "for a patron, employee, or any other person to knowingly or intentionally, in an adult entertainment establishment, appear in a *state of nudity, regardless of whether such public nudity is*

expressive in nature."[15] (Emphasis added). The phrase "state of nudity" is basically defined as a person appearing in clothing of something ***less than*** pasties and a G-string. *See* § 111.02 ("NUDITY OR STATE OF NUDITY"[16]). Accordingly, under the Ordinance, entertainers must wear at least pasties and a G-string at all times. ***Under Chapter 111, then, there is to be no fully nude dancing, or even "topless" entertainment, within the County.***

This restriction, and indeed Chapter 111 in its entirety, was enacted upon a purported concern of the "adverse secondary effects" of adult entertainment establishments. § 111.01. While discussed in greater detail in Section IV, *infra*, this doctrine, and indeed the ability to preclude nude entertainment under federal jurisprudence, has been the subject of a rash of highly-fractured plurality opinions from the Supreme Court. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (three Member plurality concluding that an anti-nudity statute could be justified upon the morality of society); *City of Erie v. Pap's, A.M.*, 529 U.S. 277 (2000) ("*Pap's II*") (five Justices, in two opinions, concluding that an ordinance proscribing public nudity could be justified upon the adverse secondary effects of

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[15] Plaintiffs do not challenge this provision in regard to non-expressive nudity, but rather merely assert that the ban on "expressive" nudity is unconstitutional. Non-expressive public nudity is already prohibited by law. *See* K.R.S. § 510.150(1)

[16] This is defined as the "showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, or the showing of the female breast with less than a full opaque covering of any part of the nipple and areola."

adult entertainment establishments, but with no majority of Justices agreeing upon the evidentiary standards to apply in such circumstances); and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (fragmented Court discussing the evidentiary burden upon the government in order to substantiate a regulation enacted upon a purported concern of adverse secondary effects). These cases all concluded, however, that in the particular circumstances presented, the Court would apply an intermediate level of constitutional scrutiny pursuant to a four part test as set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).[17]

In its opinion, the Court of Appeals analyzed the constitutionality of Chapter 111 under the *O'Brien* standards (Apx. A, pp. 29-33), as did the circuit court. R. Vol. VII, pp. 942-62; Apx. C, p. 4. The circuit court found that this test was the appropriate level of review for determining the constitutionality of the Ordinance "given its stated justification to decrease secondary effects," (R. Vol. VII, pp. 942-62; Apx. C, p. 4.), a holding affirmed by the Court of Appeals. Apx. A, pp. 31-32. Plaintiffs contend that secondary effects is not a permissible basis to reduce the level of constitutional scrutiny under the Kentucky Constitution, and that reference to Pennsylvania law is once again necessary in arriving at this conclusion.

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[17] 1) the regulation at issue is within the government's constitutional power; 2) the regulation furthers an important or substantial governmental interest; 3) the governmental interest is unrelated to the suppression of free expression; and 4) the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377.

In the years following *Barnes*, courts quickly observed irreconcilable nature of the various opinions of the Justices. In applying the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds'"), the Sixth Circuit observed that those standards were less helpful in a case where the opinions were so divergent, and the appellate court referred to its job as "reading the tea leaves of Barnes." *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994).

In 1998, the Pennsylvania Supreme Court was squarely faced with the Barnes dilemma in *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998) ("*Pap's I*"). Finding *Barnes* "hopelessly fragmented" (*Pap's I*, 719 A.2d at 277), that court concluded that the anti-nudity ordinance at issue before it was subject to strict constitutional scrutiny and was unconstitutional ***under the First Amendment***. *Id.* at 278-280. The Supreme Court reversed in yet another plurality decision. *Pap's II*, 529 U.S. 277.

The Supreme Court remanded to the Pennsylvania Supreme Court for a determination of the plaintiffs' overbreadth and state constitutional claims. *Pap's II*, 529 U.S. at 286, 302. In its decision, reported as *Pap's A.M. v. City of Erie*, 812 A.2d 591, 613 (Pa. 2002) ("*Pap's III*"), *the Supreme Court of Pennsylvania adjudicated the exact same issue facing this Court with regard to Chapter 111; that being whether an anti-nudity provision which impacts upon expressive entertainment is consistent with the state constitutional*

right of freedom of speech and expression. The Pennsylvania Supreme Court, with only a single dissent, concluded that it was not.[18] The decision in *Pap's III* is critical here because, as previously stated, ***the Pennsylvania Constitution served as the basis of the Kentucky Constitution***.

Upon remand, the Pennsylvania Supreme Court concluded that the anti-nudity ordinance at issue there – ***predicated upon a supposed concern of "secondary effects"*** (as is Chapter 111) – violated

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[18] *Accord Mendoza v. Licensing Board of Fall River*, 827 N.E.2d 180 (Mass. 2005), where the Massachusetts Supreme Court recently ruled an anti-nudity ordinance unconstitutional, even in the face of the type of secondary effects "evidence" submitted with regard to the enactment of Chapter 111. *Id.* at 189 n. 13. That court observed that the focus on "secondary effects" evidence "seems a strong indicator that the ordinance is directed at the form of nudity common in adult entertainment." *Id.* The court therefore concluded that the ordinance was unconstitutional as a ban on protected expression. *Id.* at 198-99. Equally as important, the High Court of Massachusetts noted that in exercising its independent judgment to "uphold the cherished protections of the Declaration of Rights as a matter of State constitutional law," *id.* at 191, it was following prior decisions of other state supreme courts, including *Pap's III*, *Mickens v. Kodiak*, 640 P.2d 818, 821-23 (Alaska 1982); and *Bellanca v. New York State Liquor Auth.*, 429 N.E.2d 765 (N.Y. 1981). *See also City of Nyssa v. Dufloth*, 121 P.3d 639 (Or. 2005), and *Oregon v. Ciancanelli*, 121 P.3d 613 (Or. 2005), where the Oregon Supreme Court, in applying their state constitutional right of freedom of expression (markedly similar to that at issue here and also similar to the Pennsylvania right – *Ciancanelli*, 121 P.3d at 634-35) declined to analyze various restrictions of exotic performance dance entertainment under any form of intermediate scrutiny by rejecting a secondary effects justification for such provisions. *See Nyssa*, 121 P.3d at 644 (De Muniz, J., dissenting)). These are discussed in further detail in Section I(H)(1), *infra*.

Article 1,§ 7 of their state constitution. The court rejected the intermediate scrutiny standard of *O'Brien*, and held that it must apply strict scrutiny, requiring the city to "establish that the regulation be 'narrowly drawn to accomplish a compelling governmental interest.'" *Pap's III*, 812 A.2d at 612.

The Pennsylvania Supreme Court noted that freedom of expression had a "robust constitutional history" in that state. *Id.* at 603-05. Probably most importantly, it stated that:

> "***As purely textural matter, Article I, § 7 is broader than the First Amendment*** in that it guarantees not only freedom of speech and the press, but specifically affirms the 'invaluable right' to the ***free communication of thoughts and opinions***, and the right of 'every citizen' to 'speak freely' on 'any subject' so long as that liberty is not abused. ***'Communication' is obviously broader than 'speech.'***"

Id. at 603 (emphasis added).

Certainly, the same is true here. Ky. Const. § 1 articulates that citizens are imbued with the right of "***freely communicating their thoughts and opinions***," and Ky. Const. § 8 protects the freedom to speak on "any subject." That is not to even mention the broad protections afforded by Ky. Const. § 26. Consequently, the same rights should apply here.[19]

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[19] Such a conclusion is not foreclosed by the decision in *Hendricks v. Commonwealth*, 865 S.W.2d 332 (Ky. 1993). There, this Court upheld a municipal anti-nudity ordinance challenged by a nude

In addition, in particular regard to the highly fractured plurality opinion in *Alameda Books*, by which any "secondary effects" analysis under the Federal Constitution must be governed, the High Court of Pennsylvania observed: "It is also notable that the five Justices in the U.S. Supreme Court who agreed that the *O'Brien* test applied ***could not agree upon the precise evidentiary showing which would be required to satisfy that test.***"[20] *Pap's III*, 812 A.2d at 609-10 (emphasis added).

Elaborating on this lack of guidance, the Pennsylvania Supreme Court held:

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dance establishment. *Hendricks* is not dispositive of this issue for three cogent reasons. First, it was decided before *Pap's II* and utilized the now-abandoned *Barnes* standard. Second, its makes no adjudication under the State Constitution, and contains no analysis, let alone even argument, of whether the protections under Ky. Const. § 8 are anything different than what are provided by the First Amendment. Third, and most importantly, *Hendricks* pre-dates, almost by a decade, the Pennsylvania Supreme Court decision in *Pap's III*, which has particular persuasive authority as referenced above because of the use of the Pennsylvania Constitution as the basis for the Constitution of the Commonwealth of Kentucky. For basically these same reasons, *Restaurant Ventures, LLC v. Lexington-Fayette Urban County Gov't*, 60 S.W.3d 572 (Ky. Ct. App. 2001), is similarly inapplicable. In addition, the ruling in *Jameson* reserved the state constitutional issue squarely facing this Court in this appeal because Mr. Jameson had not properly preserved that issue for appellate review. *Jameson*, 215 S.W.3d 9, 13, 14 (Ky. 2006).

[20] The lower courts never confronted this evidentiary dilemma or even the application of Pennsylvania precedent in this regard. Rather, they simply adopted the *O'Brien* standard as justification to uphold the provisions, impliedly concluding that whatever standard applied, it had been met. Apx. A, pp. 30-31.

> "Although this Court has often followed the lead of the U.S. Supreme Court in matters of free expression under Article I, §7, doing so here is no easy matter, even if we were obliged or inclined to. The position of the decisive Supreme Court concurrence by Justice Scalia – a position rejected by seven other Justices on the High Court – that this ordinance does not raise a question of protected expression at all finds no support in our jurisprudence. Nor does the concurrence offer any illumination on the proper application of the O'Brien standard, since the concurrence would have sustained the ordinance on grounds that it did not implicate protected expression at all. Meanwhile, the five Justices who agreed that O'Brien should apply ***disagreed upon the application of that intermediate scrutiny test***."

Pap's III, 812 A.2d at 611 (emphasis added). In light of this dilemma, this Court should heed the words of the High Court of Pennsylvania:

> "As a matter of policy, Pennsylvania citizens should not have the contours of their fundamental rights under our charter rendered uncertain, unknowable, or changeable, while the U.S. Supreme Court struggles to articulate a standard to govern a similar federal question."

Pap's III, 812 A.2d at 611. ***Citizens of Kentucky are entitled to no less.***

This Court should follow this additional "uniquely persuasive authority," and for the same reasons articulated by the Pennsylvania Supreme Court that

the ordinance at issue in *Pap's III* failed muster under strict scrutiny (812 A.2d at 612-13), similarly conclude that Chapter 111 is constitutionally infirm pursuant to Ky. Const. §§ 1, 2, 8 and 26, and that the lower courts thus erred.

F. THE HOURS OF OPERATION AND "NO DIRECT PAYMENT" PROVISIONS ARE CONSTITUTIONALLY INVALID.

As amended, § 111.18 now precludes an adult entertainment establishment from remaining open for business "between the hours of 1:00 a.m. and 9:00 a.m. on any day." Accordingly, defined establishments (and, again, even those providing no true "adult" entertainment, such as cabarets where entertainers have to wear at least pasties and G-strings at all times) must remain closed and must refrain from engaging in constitutionally protected expressive activities for ***eight hours of each day***. That is ***one-third of each day; one-third of each week; and one-third of each year***.

PT's is open for business from 11:00 a.m. to 4:00 a.m. Monday through Friday, 4:00 p.m. to 4:00 a.m. on Saturday, and 6:00 p.m. to 2:00 a.m. on Sunday. Affidavit of Brian Franson ("Franson Aff.") ¶ 16; Ex. E to Supp. Brief, Aug. 4, 2004; Apx. K. Mr. Franson, the Area Director of *PT's*, estimates that complying with the hours of operation restrictions as set forth in § 111.18 would result in an approximate reduction of twenty-two percent in the number of customers patronizing *PT's*; a thirty percent reduction in the number of dancers performing at the club; a thirty percent reduction in the number of dances performed;

and a thirty-two percent reduction in the revenue generated by the establishment. Id. at ¶ 19.

Blue Movies operates, and has operated in the past, twenty-four hours a day, seven days a week. Affidavit of Robert Hollis, ¶'s 4-6; Ex. F to Supp. Brief, Aug. 4, 2004; Apx. L. For a "24/7" establishment such as *Blue Movies*, the restrictions represent a *33.3% reduction* in the number of hours that it can operate. Per Mr. Hollis complying with the hours of operation provision would result in a 30% reduction in the number of customers; the amount of expressive materials presented; and business revenues. Id. at ¶ 10.

The circuit court upheld the hours of operation provision predicated upon the conclusion in *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003). R. Vol. VII, pp. 942-62, Apx. C, p. 18. The Court of Appeals affirmed. Apx. A, pp. 36-38. These rulings were erroneous.

First, *Center for Fair Public Policy* utilizes (or at least attempts to utilize) the *O'Brien* standard of intermediate scrutiny which is simply not applicable under the Kentucky Constitution. Indeed, the lower courts never explained why they had failed to undertake any independent analysis under the Constitution of the Commonwealth of Kentucky. Second, in light of the fractured nature of *Barnes*, *Pap's II*, and *Alameda Books*, it is not even clear how those *O'Brien* standards are supposed to be applied. Neither lower court engaged in any discussion of the disputes in federal courts concerning the application of the *O'Brien* elements, and in particular the "narrow tailoring" component thereof.

Because *Alameda Books* is in fact a plurality ruling, the lower federal courts have struggled to utilize the *Marks* standards in order to determine the constitutional "holding" of that decision. Most courts, including the Court of Appeals (Apx. A, p. 26 n.9) have concluded that the holding is represented by the concurring opinion of Justice Kennedy.[21] Reference to his opinion is, therefore, necessary.

Justice Kennedy notes that while regulations may constitutionally be utilized to reduce secondary effects, they cannot have the consequent effect of also reducing either speech or expression related activities, and must "*leave the quantity and accessibility of the speech substantially undiminished.*" *Alameda*, 535 U.S. at 445 (Kennedy, J., concurring) (emphasis added). As he succinctly stated, "*a city may not regulate the secondary effects of speech by suppressing the speech itself.*" *Id.* (emphasis added).

Justice Kennedy also observes that a regulation can be consistent with the First Amendment "if it is ***likely*** to cause a ***significant decrease*** in secondary effects and a ***trivial decrease*** in the quantity of speech." *Id.*

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[21] *See, e.g., 729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 491 (6th Cir. 2008). *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 721-22 (7th Cir. 2003) (regarding ordinance prohibiting the sale, use or consumption of alcohol such as is the case here – *see* Section I(G), *infra*); *SOB, Inc., v. County of Benton*, 317 F.3d 856, 861-62 (8th Cir. 2003) (public indecency ordinance); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1269 (11th Cir. 2003) (zoning and public nudity ordinances); and *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631, 637-38 (7th Cir. 2003) (alcohol prohibition and to a dancer/patron "buffer zone").

at 445 (Kennedy, J., concurring) (emphasis added). He summed up his analysis as follows:

> [A] city ***must advance some basis to show*** that its regulation has the ***purpose and effect of suppressing secondary effects***, while leaving the ***quantity*** and ***accessibility*** of ***speech substantially intact***. The ordinance may identify the speech based on content, but only as a short hand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects *by reducing speech in the same proportion*.

Id. at 449–50 (Kennedy, J., concurring) (emphasis added). Equally as important, he further stated that a constitutional analysis directed at these types of regulations ***must*** "address how speech will fare under the city's ordinance." *Id.* at 450.

Irrespective, the one court that seems to marginalize Justice Kennedy's concurring opinion is indeed the Ninth Circuit decision in *Center for Fair Public Policy*; the ruling relied upon by the lower courts. That opinion, however, is a mere two-two-one decision, and even under federal jurisprudence seems to be at odds with the general doctrine of narrow tailoring under intermediate scrutiny.

First, as noted by the dissent in *Center for Fair Public Policy*, if, as all of the other circuits agree, Justice Kennedy's concurring opinion is in fact the holding of *Alameda Books*, an hours of operation provision is the ***quintessential*** violation of those concerns. *See* 336 F.3d at 1172 (Canby, J., dissenting). Second, Justice Kennedy's opinion does no more than

operationalize the fourth prong of *O'Brien*, which requires that the "incidental" restriction on First Amendment freedoms be "no greater than is ***essential***" to the furtherance of the governmental interest. 391 U.S. at 377. The word "incidental" is generally defined to have two separate components; the effect must be both "***indirect***," and "***minimal***." If the impact is not "indirect," or, more importantly, if it is not "minimal," the regulation fails muster for not being sufficiently narrowly tailored. This is all that Justice Kennedy advocates. Given the affidavits of Franson and Hollis, as acknowledged in the circuit court's ruling (Apx. C, p. 17), the effect upon expression is neither ***minimal*** nor ***indirect***, and the challenges to these provisions should not have been summarily dismissed.

Third, economic impact is certainly one of the effects that a court must look at when determining the constitutionality of a law that impacts upon First Amendment rights (and, accordingly, state constitutional rights as well). And, for the same reason, the "no payment" provision contained in § 111.35(C) is similarly infirm, and the lower courts were in error in holding otherwise. As the Supreme Court stated in *Buckley v. Valeo*, 424 U.S. 1, 65 n.76 (1976), "money" is "a necessary and integral part of many, perhaps most, forms of communication." Succinctly put, "it is obvious that the First Amendment sets limits on the economic burdens that can be imposed upon the dissemination of protected

materials." *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 827 (4th Cir. 1979).[22]

Just as government may not simply ban expression it dislikes, it cannot use financial disincentives and

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[22] *See also United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468-69 (1995) (Court noted that "because compensation provides a significant incentive toward more expression" by artists, "[b]y denying respondents that incentive, the honoraria ban induces them to curtail their expression," and therefore "unquestionably imposes a significant burden on expressive activity"); *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 208 (1997) (the Court underwent a detailed economic analysis in determining what the First Amendment benefits and detriments were in regard to the F.C.C. "must carry" provision for cable T.V. broadcasters, and found that -- in invalidating the regulation -- an 11% decline in advertising revenues posed a "***serious risk*** of financial difficulty" and that stations would suffer "financial harm and possible ruin") (emphasis added); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 n.'s 7&8 (1975) (Court invalidated an ordinance that prohibited the showing of films containing nudity at drive-in theaters when the screen was visible from a public street or place, by concluding that the structural requirements necessary to comply with the ordinance would "increase the cost of showing films containing nudity," that in certain circumstances theaters might avoid showing these movies rather than incur the additional costs, that this could result in individuals being unable to see such films, and that the ordinance was therefore unconstitutional in that it was a "restraint on free expression"); and *Simon & Schuster, Inc.*, 502 U.S. at 116 (invalidated a law that took the profits of books by convicted criminals by noting that such a regulation "imposes a financial disincentive," and that this "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace").

economic hardship to drive disfavored expression into oblivion.[23]

Fourth, even the plurality opinion authored in *Pap's II* notes that a significant constitutional infringement would raise the level of scrutiny and shift the presumption to be against constitutional validity. "If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based." 529 U.S. at 294. The intrusions here are not *de minimis*.

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[23] In *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999) the court upheld less restrictive rules because it had "no reason to believe that this is a significant impairment of [the Plaintiffs'] business." This is not the case here. The preambles to the Ordinance, in a conclusory fashion, observe that the hours of operation restrictions will have community benefits "without significantly interfering with the availability of adult entertainment." § 111.02(H). Certainly, this evidence establishes that the preamble is incorrect. And, if the preamble is the constitutional justification for this provision, the fact that it is found to be untruthful establishes the infirmity of this Ordinance section. In any event, there were certainly issues of fact in regard to this issue that should have precluded the entry of summary judgment against the Plaintiffs. *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 809 (2000) (struck down law restricting the ability to broadcast at certain hours because there was a "significant restriction of communication, with a corresponding reduction in Playboy's revenues."); and *Playboy Entertainment Group. Inc. v. United States*, 30 F.Supp.2d 702, 711 (D. Del. 1998) (a mere 15% decline in revenues, it further observed that this impact served as a "quantitative measure of the lost First Amendment opportunities suffered by Playboy and its viewers").

Fifth, the fact that the fractured decision in Alameda Books has modified the secondary effects doctrine as first articulated by the Supreme Court in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), is demonstrated no better than by a decision from the very federal district court which is continuing the *Alameda Books* saga following remand from the Supreme Court. In *Alameda Books, Inc. v. City of Los Angeles*, Case No. CV 95 07771 DDP (C.D. Cal., June 10, 2005) (Apx. M), the district court there found that "while the *Renton* standard is still the controlling standard in this case, that standard was ***modified*** by the Supreme Court's holding in *Alameda Books*. Specifically, the court agrees with the plaintiffs that the proportionality requirement [as set forth in Justice Kennedy's concurring opinion] adds a new element to the *Renton* inquiry. . . ." Apx. M, at 19 (emphasis and clarification added).

That inquiry includes an examination of whether the regulating body advances "some basis to show that its regulation has the purpose and effect of suppressing secondary effects, ***while leaving the quantity and accessibility of speech substantially intact***." Apx. M at 21 (emphasis added). *See also* Apx. M at 22-24. The court notes that the government's premise "cannot be merely that cutting adult speech in half would probably reduce secondary effects proportionately."[24] Apx. M at 26. Yet, that is ***exactly***

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[24] If this Court does, indeed, seek to "borrow" the convoluted federal jurisprudence of intermediate scrutiny related to sexual expression, this Court must also decide, in addition to the narrow tailoring issue, the evidentiary standards that must be applied in order to satisfy the justification for such regulations. In that event, Plaintiffs contend that this Court should adopt the partial

the purpose and effect of the hours of operation restrictions here. *See also* Apx. M at 30.

Here, Plaintiffs submitted ***uncontroverted*** evidence that Metro's approach to reducing secondary effects "will do so by substantially diminishing speech." At the very least, there were material issues of fact which precluded the entry of summary judgment on this issue. For these reasons, the decision upholding the hours of operation provision should be reversed.

G. THE PROHIBITION OF THE SALE OF ALCOHOL IS UNCONSTITUTIONAL.

1. METRO LACKS CONSTITUTIONAL AUTHORITY TO UNILATERALLY IMPOSE NEW AND ABSOLUTE PROHIBITIONS ON ALCOHOL WITHOUT VOTER APPROVAL.

Section 111.30 of Metro's Ordinance, entitled "Sale of Alcoholic Beverages Prohibited," imposes a local legislative prohibition on alcohol in adult entertainment facilities. This prohibition is unconstitutional because it was enacted without voter approval, as required under § 61 of the Kentucky Constitution, and the State has not otherwise delegated to Metro any

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concurrence and partial dissent of Justice Souter in *Pap's II* (529 U.S. at 310-17), and his dissent, joined in by Justices Stevens, Ginsburg and Breyer, in *Alameda Books* (535 U.S. at 453-66), for the reasons stated therein. This issue was not, however, resolved by the circuit court. The Court of Appeals did address this issue (Apx. A, pp. 73-78), but Plaintiffs will discuss the erroneous nature of that Court's holding below.

constitutional authority under the Twenty-First Amendment of the United States Constitution to legislatively impose liquor prohibitions.[25]

The Twenty-First Amendment to the United States Constitution is the source for the States' police power over the use and distribution of alcoholic beverages. This Amendment provides in relevant part: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Generally, this provision allows each state, as a distinct unit of government, to determine liquor regulations within its jurisdiction. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (providing a history).

This Amendment, however, does not directly grant authority to local governments to regulate or otherwise control intoxicating beverages. Instead, states may choose to delegate all, part, or none of this power to local authorities. In Kentucky, the General Assembly has chosen to delegate a portion of its alcohol prohibition authority to local ***voters*** who have the power to prohibit the sale of alcohol within their own territories.[26] *See Early v. Rains*, 28 Ky.L.Rptr. 415, 89

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[25] This issue is presented here pursuant to this Court's order granting discretionary review, wherein the Court expressed an interest in reviewing "any Twenty First Amendment issues raised by the prohibition on alcohol." (Apx. B, Order Granting Discretionary Review).

[26] Section 61 of the Kentucky Constitution provides :The General Assembly shall, by general law, provide a means whereby the

S.W. 289 (1905) (history of § 61). Under this constitutional provision, "[t]he citizens who are legal voters in the territory ***alone*** can take the initiative in [alcohol prohibition] matter[s] . . . [and] it is not permitted to the Legislature to deny a town or city the right to vote on this subject ***as a whole***." *Id.* at 289 (emphasis added).

To effectuate § 61, the General Assembly enacted statutory procedures for conducting local elections regarding the prohibition of alcohol. *See* Ky.Rev.Stat. §§ 242.010- 242.990 (1998 and Supp.2007). Under these provisions, voters within Kentucky territories, rather than local governments or the Commonwealth, determine whether and where alcohol may be sold.

In enacting § 111.30, Metro ignored the constitutional and statutory requirements for alcohol prohibition in Kentucky and usurped the Commonwealth's authority under the Twenty-First Amendment, which has been delegated to local voters. This violates Constitution § 61 and the corresponding voting procedures found in KRS §§ 242.010- 242.990. It also violates KRS § 82.082, which bars Metro from exercising "any power . . . in conflict with a constitutional provision or statute."

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sense of the people of any county, city, town, district or precinct may be taken, as to whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or the sale thereof regulated. But nothing herein shall be construed to interfere with or to repeal any law in force relating to the sale or gift of such liquors. All such elections may be held on a day other than the regular election days.

The constitutional restriction on local governments enacting liquor prohibitions in Kentucky was recognized in *Iacobucci v. City of Newport, Kentucky*, 785 F.2d 1354 (6th Cir.1986), *rev'd*, 479 U.S. 92 (1986). In that case, the United States Court of Appeals for the Sixth Circuit held that an ordinance enacted by the city council of Newport, Kentucky, which prohibited nude or nearly nude dancing in establishments selling liquor, was an unconstitutional exercise of police powers outside the realm of the Twenty-First Amendment. In rejecting the city ordinance, the court acknowledged that the Commonwealth of Kentucky's power to ban the sale of alcoholic beverages entirely under the Twenty-First Amendment "included the lesser power to ban the sale of liquor on premises where topless dancing occurs." *Id.* at 1358 (citations omitted). The court, however, questioned whether the Commonwealth had delegated this power to local legislative authorities:

> Given the express statutory authorization for cities to conduct popular elections on the question of local prohibition, see K.R.S. §§ 242.010-242.990, as required by the Kentucky Constitution, it is very doubtful that a city in Kentucky may by ordinance "ban the sale of alcoholic beverages entirely." . . . A local government cannot exercise in part a power it does not hold in full, and the citizens of Louisville/Jefferson County have not chosen to exercise the power granted to them by K.R.S. §§ 242.010- 242.990 and § 61 of the Kentucky Constitution.

Id. at 1358.

The Supreme Court reversed the Sixth Circuit's decision insofar as the appellate court fail to consider and apply *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981). But the Court "expressed no opinion" on the "state-law question" of whether the Commonwealth had delegated to local legislatures the authority to enact prohibitions on alcohol. *Iacobucci*, 479 U.S. at 96 n.6 (1986).[27]

In an apparent effort to avoid the Twenty-First Amendment delegation-defect identified in *Iacobucci*, Metro has claimed that § 111.30 is not a liquor regulation, but merely a regulation of adult entertainment facilities. Metro Court of Appeals Br., p. 39. With all due respect, this is a distinction without a difference. Regardless of the ***form*** that Metro uses to classify and describe § 111.30, Metro, ***in substance***, has imposed a prohibition on the sale of alcohol without voter approval. And as a result, it has violated the Kentucky Constitution.

Local governments in Kentucky share some concurrent responsibilities with the Commonwealth for the regulation of alcohol.[28] But the fact of the

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[27] The precedential value of the Supreme Court's approval of the ordinance in *Iacobucci* has been called into question following the Court's subsequent ruling in *44 Liquormart*. *See Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 1002 n.6 (11th Cir. 1998). But regardless of the *44 Liquormart* decision, the Twenty-First Amendment delegation concerns identified by the Supreme Court and the Sixth Circuit in *Iacobucci* still exist.

[28] For example, KRS 241.160 requires cities wherein alcoholic beverages are sold to appoint a local administrator. And under KRS 241.190, the local administrator has the same duties and responsibilities regarding local licenses as the State Board has to

matter is, local governments do not share concurrent power with the ***voters*** to approve local prohibitions on alcohol. Under § 61 of the Constitution, this power has been delegated only to local electorates. Thus, while Metro can ***regulate*** alcohol, in some capacities, concurrently and consistently with state authorities, it may not impose an outright ***prohibition*** on the sale of alcohol without voter approval. This is precisely what Metro has done.

2. EVEN ASSUMING METRO HAS AUTHORITY TO PROHIBIT ALCOHOL WITHOUT VOTER APPROVAL, SECTION 111.30 IS PREEMPTED BY STATE LEGISLATION.

Section 111.30 prohibits those establishments which hold adult entertainment business licenses from also obtaining liquor licenses. This provision of the Ordinance is preempted by state statute. "[T]he power of the state to regulate the alcoholic beverage industry is supreme. Any delegation of that authority, because of the nature of the industry, must be specific and unequivocal, not merely inferential." *Whitehead v. Estate of Bravard*, 719 S.W. 2d 720, 724 (Ky. 1986). Thus, any local regulation of that industry must be specifically authorized by the General Assembly or the Alcoholic Beverage Control Board. *Id.* In *City of Ashland v. Kentucky Alcoholic Beverage Control Bd.*, 982 S.W. 2d 210, 213 (Ky. Ct. App. 1998), the court held that absent express or specific authority to disqualify certain retailers from holding an alcoholic

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state licenses. Moreover, KRS 243.070 gives local authorities the power to impose license fees upon the sale of alcohol.

beverage license, such a restriction was invalid, and stated:

> However, there is no express or specific authority to create a scheme that disqualifies certain types of retailers such as grocery stores or gasoline stations from obtaining a package license to sell alcoholic beverages. We agree with the lower court that any conflict between the City's ordinance and a specific statute must be resolved in favor of the statute. *See Commonwealth v. Do, Inc., Ky.*, 674 S.W.2d 519 (1984).

Recently, in *Ky. Licensed Beverage Ass'n v. Louisville - Jefferson County Metro Gov't,* 127 S.W.3d 647 (Ky. 2004), this Court again reaffirmed that where a local ordinance is in conflict with state statues, it may not be enforced:

> Accordingly, the Metro Government's ordinance is in conflict with state statutes on the subject and is not authorized pursuant to any home rule statute cited above. Therefore, in absence of a particular grant of authority to regulate non-licensees by the imposition of civil fines in KRS 241 et seq., the Metro Government is without authority to apply the penalties set forth in the Ordinance to non-licensees. See *Boyle v. Campbell, Ky.*, 450 S.W.2d 265, 268 (1970) (invalidating a city ordinance dealing with Sunday Closing laws, and holding that "if the doctrines of 'preemption' and 'conflict' are not dispositive . . . there is a basic concept which invalidates this ordinance. . . . that the City of Bowling Green simply lacks the authority by

> local law to amend, modify, interpret or construe at [sic] state statute").

Id. at 649 (clarification in original).

There is no state statute that prohibits a business engaged in "adult entertainment" from applying for and receiving a liquor license. As stated, a number of the Plaintiffs possess just such a license. This provision is therefore statutorily preempted in regard to them.

3. SECTION 111.30 IMPOSES AN UNCONSTITUTIONAL CONDITION ON THE ISSUANCE OF A LICENSE.

The government may not condition the issuance of a license upon the agreement of the applicant to give up or waive his or her constitutional rights, as the Sixth Circuit made clear in *G & V Lounge, Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071, 1077 (6th Cir. 1994). The Ordinance flatly contradicts the well-established precedent that a state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or entertainment permit, on an agreement to refrain from exercising one's constitutional rights, especially one's right to free expression. *Id.*[29] Nevertheless, § 111.44 requires

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[29] *See also Perry v. Sinderman*, 408 U.S. 593, 597 (1972) ("For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests –

that the liquor-licensed Plaintiffs, as a condition of obtaining their adult business licenses, give up their liquor licenses. Those Plaintiffs have made significant investments in time, money and energy in establishing their businesses, and each of their licenses are valuable. Metro may not condition the maintenance of the Plaintiffs' liquor licenses upon their willingness to give up their right to engage in constitutionally protected expression. As such, the imposition of such a condition as a requirement to obtain or maintain a liquor license is blatantly unconstitutional and is preempted by state law.

H. THE ENTERTAINMENT "BUFFER ZONE" PROVISIONS ARE INFIRM UNDER THE KENTUCKY CONSTITUTION.

Chapter 111 creates an entertainment "buffer zone" by providing that it is a violation for any employee to appear "semi-nude" (*i.e.*, while ***clothed***) unless he or she is located ". . .at least six (6) feet from any patron or customer and on a fixed stage at least eighteen (18) inches from the floor." § 111.35(B). The lower courts erred in upholding the constitutionality of such provisions as they violate the Kentucky Constitution for a variety of reasons.

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especially his interest in freedom of speech"); *Keyshian v. Board of Regents*, 385 U.S. 589, 606 (1967) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege")); and *44 Liquormart*, 517 U.S. at 513(" . . .it does not follow that conferral of [a governmental] benefit may be conditioned on the surrender of a constitutional right") (clarification added).

1. THE BUFFER ZONE DOES NOT PASS MUSTER UNDER THE HEIGHTENED SCRUTINY REQUIRED BY THE KENTUCKY CONSTITUTION.

That the six-foot buffer zone does not pass scrutiny under the Kentucky Constitution is ***directly*** demonstrated by the Oregon Supreme Court's recent consideration of the constitutionality of a similar (but two foot ***smaller***) buffer zone under Art I,§ 8 of the Oregon Constitution[30] in *City of Nyssa v. Dufloth,* 121 P.3d 639 (Or. 2005). There, the ordinance in question required every entertainer to be clothed unless "removed at least four feet from the nearest patron." *Id.* at 640. In its decision, the Oregon Supreme Court relied on its analysis in the related case of *Oregon v. Ciancanelli*, 121 P.3d 639 (Or. 2005) decided the same day. That decision found that a statute prohibiting "live public shows" in which participants engaged in "sexual conduct" was aimed directly toward the expressive aspect of the conduct that the law described, and therefore was a regulation restraining free expression. *Id.* at 634.

Applying that construct, the court in *Nyssa* found that a four foot buffer zone was also specifically directed by its terms at restraining free expression since the ordinance applied only to performances in establishments that regularly featured nude entertainment. *Nyssa*, 121 P.3d at 643-35:

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[30] Article I, § 8 of the Oregon Constitution is similar to the corollary provisions of the Kentucky Constitution, and provides that: "No law shall be passed restraining the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

> . . . Article I, section 8, precludes the Legislature from using limitations on speech or expression as a substitute for regulating that conduct directly. . . . In the present case, the city constitutionally can regulate such conduct as sexually contact between performers and patrons, and the fact that an individual uses speech or expression in the course of that conduct would not immunize the individual from prosecution. However, that is not what the ordinance at issue here does. The four-foot ordinance does not specifically preclude or even refer to sexual contact between performers and patrons. Rather, as discussed, it simply restrains certain kinds of expression in certain kinds of establishments.

Id. at 643 n.5 (citations omitted). Accordingly, the buffer zone ordinance was found unconstitutional on its face as a restraint upon free expression. *Id.* at 643-644.

The six foot buffer zone here is similarly directed solely at the expressive aspect of live entertainment, and is therefore a direct restraint on expression protected by the Kentucky Constitution. As noted in *Nyssa*, these types of buffer zones are aimed directly at a particular type of expression as they only apply to "one disfavored type of communication (nude performances) in one disfavored type of establishment (one that regularly features that type of entertainment)."[31] *Id.* at 643 (clarifications in original).

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[31] It is important to note that the buffer zone in *Nyssa* applied in regard to ***nude*** entertainers. As stated herein on numerous

Chapter 111 also restrains free expression and should therefore have been declared unconstitutional.

2. THE BUFFER ZONE PROVISIONS ARE UNCONSTITUTIONAL AS THEY VIOLATE THE STATE RIGHT OF ASSOCIATION.

Section 1 of the Kentucky Constitution protects the freedom of association. The corollary rights protected under the First Amendment are described in *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984), where the Court stated that it "has recognized a ***right to associate*** for the purpose of *engaging in those activities protected by the First Amendment*." (Emphasis added). Here, of course, Plaintiffs are engaged in "First Amendment" speech-related activities. And, the Sixth Circuit has agreed that exotic dance performers and patrons desiring to view such entertainment are indeed imbued with freedom of association protections under the First Amendment. *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson* County, 274 F.3d 377, 396-97 (6th Cir. 2001).

Most importantly, freedom of association rights are not analyzed under an intermediate level of scrutiny. Rather, infringements on such liberties must pass muster under strict scrutiny in order to be upheld. "Infringements on that right may be justified by regulations adopted to serve ***compelling*** state interests, unrelated to the suppression of ideas, that

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occasions, neither nude nor even "topless" entertainment is permitted under the provisions of Chapter 111.

cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623 (emphasis added). *Accord Deja Vu of Nashville*, 274 F.3d at 396. Consequently, the freedom of association rights under the Kentucky Constitution must be evaluated pursuant to strict scrutiny as well.

The lower courts improperly rejected Plaintiffs' freedom of association argument in regard to the buffer zone provisions by in fact relying upon *Deja Vu of Nashville*. R. Vol. VII, pp. 942-62; Apx. C, p. 16; Apx. A, pp. 46-47. What those courts failed to recognize was that the Sixth Circuit ***agreed*** that exotic dance entertainers and their patrons (even while nude - - which is certainly not the circumstance here) receive freedom of association rights under the First Amendment, and that a ***three foot*** buffer zone was narrowly tailored because "it went no further than necessary. . . ." *Id.* at 396-97. *See also Kentucky Restaurant Concepts*, 209 F.Supp.2d at 680-82 (a ***three foot*** buffer zone contained in the now-superceded Louisville Code of Ordinances went "no further" than necessary and was therefore sufficiently narrowly tailored).[32]

Consequently, given the fact that Metro has enacted a buffer zone *twice as large* as the Sixth Circuit and the federal district court in Louisville have held necessary to effectuate the purported governmental interests, it goes without saying that

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[32] In addition, both of these cases were decided before the Supreme Court decision in *Alameda Books*, which significantly undercuts any contention that the government can enact such entertainment buffer zones.

such a requirement cannot pass muster under the narrow tailoring component of either *intermediate or strict scrutiny*. The governmental concerns noted by the Sixth Circuit in *Deja Vu of Nashville* are simply irrelevant here, for those entertainers could dance ***fully nude***. Here, Chapter 111 ***specifically precludes*** such dance entertainment.

3. THE BUFFER ZONE FAILS MUSTER EVEN UNDER FREE SPEECH INTERMEDIATE SCRUTINY.

Assuming, *arguendo*, that the constitutionality of the entertainment buffer zone under Ky. Const. § 8 is to be evaluated pursuant to federal intermediate scrutiny (whatever that may be), the first thing for this Court to determine is whether Metro had the power to enact this regulation in the first place. *O'Brien*, 391 U.S. at 377. It did not.

The preambles to Chapter 111 do not articulate a specific reason for adoption of these restrictions. Accordingly, it is somewhat difficult to discern the supposed governmental interest underlying their enactment. It is safe to conclude that the supposed purpose was to reduce the chance of illegal activity occurring between dancers and customers; *i.e.*, some type of illegal or impermissible touching between the two. There is nothing inherently illegal about an entertainer, while wearing pasties and a G-string, from dancing five feet eleven inches away from a customer, or performing on a stage that is only seventeen (as opposed to eighteen) inches "from the floor." § 111.35(B).

Consequently, the ability of Metro to enact this "buffer zone" is governed by the dictates of the Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 253 (2002), where the it concluded that the government may not prohibit speech "because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" Metro simply does not then have the authority to preclude a form of close but ***clothed*** dancing not consisting of some form of illegal contact. The remedies available to government are to punish violations of the law; not to abridge the rights of free speech. *Free Speech Coalition*, 535 U.S. at 245. *See also Commonwealth v. Ashcraft*, 691 S.W.2d 229, 232 (Ky. Ct. App. 1985) (regulation is overbroad when "in an effort to control impermissible conduct, the [ordinance] also prohibits conduct which is constitutionally permissible" (clarification added)). Metro may prohibit impermissible sexual touching, but it may not criminalize ***clothed*** dancing in close proximity to viewers. While the former may be narrowly tailored, the latter is not.

But the foremost reason that this "buffer zone" is not narrowly tailored is because of its impact upon protected expression. In Subsection I(F), Plaintiffs discussed the fact that imposing a significant impact upon expressive activities is a constitutional deprivation. Part of that argument revolves around Justice Kennedy's critical concurrence in *Alameda Books*. There, he provides an example of when his "proportionality" standard has been violated. If a law has a minimal *two percent impact upon speech and expression-related activities,* it will not be found to be constitutionally wanting. 535 U.S. at 451-53. He

describes the constitutionally allowable impact as being limited to that which is "trivial." *Id.* at 445.

The law in the Sixth Circuit in regard to this issue pre-*Alameda Books* is found in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 41s3 (6th Cir. 1997), where the appellate court concluded that the effect of a dancer buffer zone must be examined in order to determine whether it "intended to destroy the market for adult cabarets . . . ." The court there noted that the plaintiffs had failed to present any evidence substantiating any harm associated with the buffer zone at issue there. *Id.* In the lower courts here, however, Plaintiffs presented detailed evidence substantiating just such drastic consequences.

The Affidavit of Franson (Ex. E to Supp. Brief, Aug. 4, 2004; Apx. K) attached as Exhibit 2 thereto a diagram of the *PT's* club, and demonstrates the effect that the buffer zone would have on that establishment. The areas in green are where entertainers perform, and the red hatching are all of the areas of the club where -- if entertainers were performing in the green areas -- customers could ***not*** be located pursuant to the requirements of the six foot buffer zone. Id. at ¶'s 7-10.

A simple review by this Court of Ex. 2 to Mr. Franson's affidavit illustrates that the dissemination of this form of ***clothed*** expression will be ***significantly*** reduced -- if not completely obliterated - - if § 111.35(B) can be enforced. Either, there is little-to-no space left in the club for customers to locate when entertainers are utilizing the stage areas, or if customers are using all of the floor space currently available to them, there is ***no*** space left ***anywhere*** in the club for entertainers to perform. Id. ¶'s 12 and 13.

A federal court has addressed these types of concerns in regard to a ten foot buffer zone in the case of *J.L. Spoons, Inc. v. City of Brunswick*, 49 F.Supp.2d 1032, 1046 (N.D. Ohio 1999), and found this type of evidence sufficient to justify an injunction against such a buffer zone.[33] The same type of evidence certainly precluded the entry of summary judgment against the Plaintiffs on this issue.

I. THE RESTRICTIONS ARE SUBJECT TO STRICT CONSTITUTIONAL SCRUTINY AND DO NOT PASS MUSTER UNDER THAT STANDARD.

For the reasons set forth above, the challenged provisions of Chapter 111 are subject to strict scrutiny. Either, they are subject to that level of review in-and-of-themselves, or because they do not satisfy the *O'Brien* standards, they must be subject to strict constitutional scrutiny. The restrictions as contained in Chapter 111, however, do not pass muster under that heightened standard because they are certainly not the "least restrictive means" available which would be necessary in order to further a compelling governmental interest. Even if "adverse secondary

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[33] The district court in *J.L. Spoons* also observed that the two foot stage height requirement rendered the buffer zone duplicative and therefore most likely unconstitutional. *Id.* at 49 F.Supp.2d at 1045-46 (". . . if performers already must remain on a stage that is two feet high, it is especially difficult to see how the ten-foot buffer zone is narrowly tailored to the City's interest in preventing crime and disease"). Given the fact that § 111.36(B) contains a similar (albeit eighteen inch) stage height requirement, the buffer zone fails the narrow tailoring component of *O'Brien* for this additional reason.

effects" could be used as a basis to justify such regulations, there are certainly a myriad of less restrictive means available which would not so adversely impact upon the engagement of speech and expression-related activities. Zoning laws and prohibitions against sexual conduct and contact are only a few such examples. Because Chapter 111, however, has such a drastic impact upon protected expression, it does not satisfy the requisites of strict scrutiny which the Kentucky Constitution requires.

II. THE LOWER COURTS ERRED IN RULING THAT THE PLAINTIFFS LACKED STANDING TO RAISE A NUMBER OF CONSTITUTIONAL CHALLENGES.

Plaintiffs challenged a number of terms contained in Chapter 111, including the critical definitions therein, as being impermissibly vague. Brief, March 5, 2004; Apx. T, pp. 41-46. Yet, the circuit court concluded that Plaintiffs lacked standing to challenge the definitions under § 111.02 as to what would constitute an "adult entertainment establishment because Plaintiffs ***admittedly*** qualify as such establishments." R. Vol. VII, pp. 942-62; Apx. C, p. 13. The Court of Appeals affirmed for the same reason. Apx. A, pp. 57-58. Respectfully, Plaintiffs never "admitted" any such thing.

In fact, Plaintiffs' complaint asserts only that "*Defendant* contends that Plaintiffs are subject to the regulatory provisions of the Ordinance. . . ." Complaint, ¶ 17; R. Vol. I, pp. 1-44. *See also* Complaint, ¶ 24 (same allegation). Paragraph 21 of the complaint further asserts that two entertainers, despite wearing clothing covering more than required

in the Ordinance, received citations for violating Chapter 111 and "are now subject to criminal penalties." The paragraph also states that this action "was taken despite Metro's representations to Division 6 [the circuit court] that the regulatory provisions would ***not*** apply to entertainers dressed in such a fashion." (Emphasis and clarification added). Accordingly, Plaintiffs have not "admitted" that they "qualify" as such establishments, and because the definitions of the Ordinance are so central to the enforceability of its provisions, the appellate court's ruling should not stand until these issues are addressed and resolved.

The circuit court also concluded that Plaintiffs lacked standing to challenge the prohibition of minors as set forth in § 111.17 (Plaintiffs having raised this argument in Apx. U, pp. 18-24), stating that the rights of minors "are not before this Court. . . ." R. Vol. VII, pp. 942-62; Apx. C, p. 9. This conclusion is erroneous for two reasons. First, the prohibition that Plaintiffs challenged, the violation of which is subject to a civil fine, imprisonment, and license suspension and/or revocation (*see, e.g.*, § 111.99 and § 111.43), applies to the "***operator***," and ***not*** the minor. *See* § 111.17(a) ("an *operator or employee* of an adult entertainment establishment shall not permit a person under eighteen (18) years of age to be employed by or to enter the establishment") (emphasis added). Consequently, Plaintiffs are not asserting the rights of minors; they are asserting *their own rights* to not be subject to prosecution under an ordinance provision that directly

applies penalties to ***them***. Second, Plaintiffs are clearly entitled to assert standing of their patrons. [34]

Because of these erroneous standing rulings, the circuit court never addressed the ***merits*** of these claims and, consequently, its decision should therefore be reversed. The Court of Appeals affirmed (Apx. A, pp. 58-61), and held that Plaintiffs set forth a different argument before the Court of Appeals than the one submitted to the circuit court. Apx. A, p. 59. Respectfully, the difference was because Plaintiffs were not arguing their standing to raise this issue before the circuit court; they were discussing the issue of preclusion of minors from the business. The circuit court raised the standing issue in its decision, and Plaintiffs therefore addressed with the Court of Appeals the minor restrictions in response to that aspect of the circuit court's decision, demonstrating why Plaintiffs had standing. Further, Plaintiffs' argument was misconstrued by the Court of Appeals. Apx. A, pp. 60-61. ***If*** the nudity provisions were found to be constitutional, ***then*** the businesses would cease to be true "adult" establishments. *See* Apx. U, p. 19. Therefore, Plaintiffs' patrons could then include

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[34] *See Connection Distributing Co. v. Reno*, 154 F.3d 281, 289 n.6 (6th Cir. 1998) (adult entertainment magazine had standing to assert rights of its advertisers and readers); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1252 (5th Cir. 1995) (adult cabaret has standing to assert the rights of entertainers who perform there); *Craig v. Boren*, 429 U.S. 190, 192-97 (1976) (seller of beer had standing to argue that statute violated customers' equal protection rights); and *Carey v. Population Serv. Int'l*, 431 U.S. 678, 682-84 (1977) (seller of contraceptives had standing to assert customers' substantive due process rights).

minors. The Court of Appeals holding on this issue should also be reversed.

III. THE CIRCUIT COURT ERRED IN DISMISSING THE ACTION WITHOUT ADJUDICATING NO LESS THAN SIX OF THE PLAINTIFFS' PRELIMINARY INJUNCTION ARGUMENTS, AND THE COURT OF APPEALS ERRED IN AFFIRMING.

Plaintiffs raised the following arguments in their briefings which the circuit court simply failed to address in its ruling; each of which was sufficient to warrant the denial of summary judgment in favor of the Defendant. The Court of Appeals erred in finding that each of these claims were either sufficiently addressed or were without merit. These include:

- The inspection provisions as contained in § 111.39 violated the doctrine of unconstitutional conditions. Plaintiffs raised this issue in their Brief filed March 5, 2004; Apx. T, pp. 48-52.[35] The circuit court failed to

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[35] Because the circuit court never even addressed these various matters, Plaintiffs will not substantively discuss them in detail here, but rather refer this Court to the sections of the various memoranda in the record where they were extensively commented upon for the detailed arguments as to why these provisions are unconstitutional. Nevertheless, Plaintiffs will in footnote form, provide very brief references to the applicable authorities which support the unconstitutionality of these provisions. On this issue, *see, e.g.*, *G&V Lounge*, 23 F.3d at 1077 (government cannot condition the receipt of a benefit, such as a license, upon the agreement to refrain from exercising one's constitutional rights – here the rights under Ky. Const. § 10 against warrantless searches); and *44 Liquor Mart*, 517 U.S. at 513 (1996) (same).

rule on this issue, even though it noted in its Dec. 14 Order this argument. R. Vol. VII, pp. 942-62; Apx. C, pp. 7-8. *See also* Apx. A, p. 62.

• The no direct "tipping" provision of § 111.35(C) violated the right of liberty and the right of freedom of speech. Supp. Brief, Aug. 4, 2004; Apx. U, pp. 64-69.[36] While the circuit court concluded that this ordinance provision was not vague (R. Vol. VII, pp. 942-62; Apx. C, pp. 16-17), ***Plaintiffs had made no such vagueness challenge***. *See also* Apx. A, p. 63.

• The entertainment "buffer zone" as set forth in § 111.35(B) violated the right of liberty. Supp. Brief, Aug. 4, 2004; Apx. U, pp. 73-75.[37] *See also* Apx. A, pp. 63-64.

• The licensing scheme is unconstitutional because it does not maintain the status quo pending judicial

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[36] In regard to the violation of the entertainers' liberty interest, the most relevant authorities include *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (court referring to the "broad statements" of the substantive reach of liberty under the Due Process Clause, and that liberty "presumes an autonomy of self that includes freedom of thought, belief, [and] expression. . . "); and *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (liberty includes the right "to live and work where he will; to earn his livelihood by any lawful calling; [and] to pursue any livelihood or avocation. . .") (clarifications added).

[37] *See* n. 36, *supra*. In addition, the Court in *Lawrence* noted that "[f]reedom extends beyond spatial bounds." 539 U.S. at 562.

determination. Brief, March 5, 2004; Apx. T, pp. 32-34.[38] *See also* Apx. A, p. 64.

• The licensing scheme of Chapter 111 does not contain the requisite procedural guarantees because it does not require Metro to initiate judicial review and to carry the burden of proof once in court. Brief, March 5, 2004; Apx. T, pp. 34-38.[39] *See also* Apx. A, pp. 64-65.

• Metro cannot engraft a dancer buffer zone and "no tip" provision, because Chapter 111 already prohibits both full nudity and "topless" entertainment, which has been recognized by the courts as being the "*de minimis*" restriction to satisfy the narrow tailoring component of intermediate scrutiny. Supp. Brief, Aug. 4, 2004; Apx. U, pp. 24-29[40]. *See also* Apx. A, pp. 65-66.

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[38] *See Deja Vu of Nashville*, 274 F.3d at 400 ("the status quo must be preserved pending a final judicial determination on the merits"); *T.K.'s Video, Inc. v. Denton County*, 24 F.3d 705, 708 (5th Cir. 1994) (cannot regulate an existing business during the licensing process); and *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965) (for a law which effectuates a prior restraint on expression to pass muster, it must, among other things, provide that any restraint prior to judicial review can be imposed only for a specified brief period of time during which the status quo must be maintained).

[39] *See Freedman* 380 U.S. at 58-60 (the government must bear the burden of going to court to suppress speech and must bear the burden of proof once in court); and *Cathy's Tap, Inc. v. Village of Mapleton*, 65 F.Supp.2d 874, 889-91 (C.D. Ill. 1999) (licensing scheme of adult businesses must contain the *Freedman* requirement that the government initiate judicial review and bear the burden of proof once in court).

[40] *See G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d. 631, 637-38 (7th Cir. 2003) (ordinances prohibiting nude and "topless"

Because the circuit court did not adjudicate any of these critical constitutional issues (despite the Court of Appeals' holding to the contrary), because Plaintiffs' arguments on these matters are well taken, and because each and every one of these claims was sufficient to defeat the entry of summary judgment on behalf of the Defendant, the decision below should be reversed, with instructions for the circuit court to consider and resolve these various claims.

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dancing in an establishment licensed to sell alcoholic beverages, prohibiting nude and topless dancers from having any physical contact with any other person during a performance, and imposing a buffer zone, were constitutional because they did not prohibit nude dancing (unlike Chapter 111), and the entertainment was not effected because "if all dancers choose to wear *de minimis* clothing necessary to cover all 'specified anatomical parts' then neither the physical proximity nor alcohol prohibition requirement are implicated"); *Kentucky Restaurant Concepts*, 209 F.Supp.2d at 682 (same); and *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 413-16 (7th Cir. 2004) (regulation of entertainment establishments which provided ***clothed*** entertainment (such as Chapter 111 now does) was unconstitutional because, in utilizing Justice Kennedy's approach in *Alameda Books*, as a "direct restriction on erotic expression speech fares worse under the Ordinance than it did under the laws at issue in similar cases," with the court further noting that the ordinance did not apply to nude dancing or other forms of nude entertainment, and that the "uniqueness of the Ordinance is that it removes nudity from the calculus and seeks to regulate clothed individuals"). Here this Ordinance precludes nude entertainment but still then regulates clothed expression.

IV. THE CIRCUIT COURT ERRED IN DISMISSING - - AND THE COURT OF APPEALS ERRED IN AFFIRMING - - THE ACTION WITHOUT AFFORDING THE PLAINTIFFS THE OPPORTUNITY TO LITIGATE THEIR "AS APPLIED" CHALLENGE TO THE "SECONDARY EFFECTS" JUSTIFICATION FOR THE ENACTMENT OF THE ORDINANCE.

One of the challenges brought by Plaintiffs was that Chapter 111 was "not enacted upon a proper basis, nor supported by competent and material evidence. . . ." Complaint, Ex. D, ¶ 27(u); R. Vol. I, pp. 1-44. As the Supreme Court noted in *Renton*, the enactment of at least zoning ordinances directed at "adult" businesses could be justified by the "secondary effects" of such establishments (*i.e.*, the causing of neighborhood crime, decreases in property values, and the increasing of urban blight). 475 U.S. at 47. Chapter 111 was certainly enacted upon such purported concerns. *See* Apx. D, § 111.01. Yet, assuming, *arguendo*, that irrespective of the matters discussed in Subsections I(B) and (E) above (that this doctrine cannot be utilized under the Kentucky Constitution to justify the enactment of restrictions like those in Chapter 111), this Court nevertheless decides that "Federal" intermediate scrutiny is the appropriate standard to apply, Plaintiffs certainly have the right to ***challenge*** Metro's assertion that its Ordinance is justified upon a concern of adverse secondary effects. First, the Court observed in *Pap's II*, where it extended – in a plurality fashion – application of the secondary effects doctrine to anti-nudity laws:

> Here, Kandyland [the plaintiff there] has had ample opportunity to contest the council's findings about secondary effects -- before the council itself, throughout the state proceedings, and before this Court. Yet to this day, *Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings.*

Pap's II, 529 U.S. at 298 (emphasis and clarification added).

Second, in *Alameda Books*, the plurality opinion authored by Justice O'Connor noted that in attempting to justify restrictions on expression, a municipality can't "get away with shoddy data or reasoning," and that its "evidence must fairly support the municipality's rationale for its ordinance." 535 U.S. at 438-39. Further, the Court held that:

> If plaintiffs ***fail to cast direct doubt*** on this rationale, *either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings*, the municipality meets the standard set forth in Renton. If plaintiffs ***succeed in casting doubt*** *on a municipality's rationale in either manner*, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438-39 (clarification and emphasis added).

While Plaintiffs raised such a challenge as to the evidentiary justification for the enactment of Chapter

111 and the amendments thereto in their complaint, this matter was ***not*** at issue in the three pending motions. Plaintiffs pointed that out to the circuit court. *See* Plaintiffs' Response to Motion for Summary Judgment, R. Vol. III, pp. 433-49, at pp. 1-2. Nevertheless, the court granted complete summary judgment to the Defendant and never permitted Plaintiffs to factually litigate their secondary effects challenge. ***More importantly, the circuit court actually "cleansed" the record in order to insure that this factual issue would not be ripe for consideration in the pending motions.***

When Metro filed its Composite Reply in Support of its Motions for Summary Judgment and to Dissolve, and in Opposition to the Plaintiffs' Motion for Temporary Injunction, it raised specific arguments in regard to its evidentiary "justification" for enacting Chapter 111, and submitted affidavits in support thereof. Because Metro was then raising new arguments for the first time in its reply, Plaintiffs filed a motion to strike the composite reply. R. Vol. VII, pp. 899-910; Apx. N. Pursuant to that motion, the circuit court initially granted the relief requested, which was the ability of Plaintiffs to complete certain depositions,[41] and to then file a sur-reply brief with necessary counter-affidavits. R. Vol. VI, pp. 897-98; Apx. O.

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[41] The various deposition notices and accompanying expert witness interrogatories are found as Apx. R. No discovery was, however, taken before the circuit court entered summary disposition.

Defendant then filed a motion for clarification. R. Vol. VII, pp. 918-24. The court then entered an Order – ***issued by agreement of the parties*** – stating that the reply was to be stricken, and ordering that Metro was to file a "new Reply ***which eliminates reference to the affidavits filed in the stricken reply***. . . ." R. Vol. VII, pp. 933-34; Apx. P (emphasis added). The court also ordered, again pursuant to the agreement of the parties, that ***Plaintiffs*** would strike "Exhibit C" of their exhibits in support of their Motion for Temporary Injunction and Supplemental Response to Defendant's Motion to Dissolve Temporary [sic] Restraining Order. Id.

"Exhibit C," which was stricken, was the affidavit of Plaintiffs' secondary effects expert, Dr. Daniel Linz, with supporting evidentiary materials.[42] Apx. S. Subsequently, Judge Ryan entered an amended order

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[42] In addition, during the pendency of these motions, the Court of Appeals issued its decision in *Jameson v. Commonwealth*, 2004 WL 1752597 (Ky. Ct. App. 2004), *rev'd* 215 S.W.3d 9 (Ky. 2006), which dealt with such an evidentiary challenge. This led to Plaintiffs filing a second supplemental brief for the purpose of demonstrating that full summary judgment could not be justified (even if the court disagreed with every contention raised by the Plaintiffs in the pending motions), because Plaintiffs could submit at trial virtually the same type of evidence which the Court of Appeals in *Jameson* found to have rebutted the supposed "secondary effects" basis for enacting the ordinance there. Attached thereto was trial testimony from a federal district court action in Louisville involving some of these same Plaintiffs, and exhibits that were previously entered in that action establishing a lack of connection between a number of the "cabarets" in town and adverse secondary effects. Testimony was also attached which concerned the lack of disease transmission in these type of establishments. R. Vol. IV, pp. 588-98; Apx. V.

(R. Vol VII, pp. 937-38; Apx. Q) which clarified what was being stricken, and required Metro to file a "new Reply which ***eliminates reference to the secondary effects affidavits filed in the stricken Reply***. . . ." (New language underlined).

The court insured that the evidentiary challenge to the secondary effects basis would not be at issue in the pending motions, yet it then granted virtually complete summary judgment to the Defendant without ever affording the Plaintiffs the opportunity to litigate that claim. Despite the Court of Appeals' interpretation (Apx. A, pp. 66-72), the fact remains that this issue was removed from full consideration.

The Court of Appeals then spent five pages of its opinion discussing this Court's decision in Jameson[43] (Apx. A, 73-78), and evaluated the few references in the lower court to potential secondary effects evidence, concluding that even though the circuit court denied Plaintiffs the ability to even attempt to cast doubt on Metro's supposed evidence, "there was no error by the trial court." Apx. A, p. 78. The Court of Appeals took it upon itself to evaluate what would ultimately be a ***factual*** dispute and found that "we conclude that the stated reasons articulated by Metro were not pretextual as a prior restraint on free expression, but rather an effort, in accord with the well-established law, to curb the secondary effects associated with adult entertainment establishments." Apx. A, p. 78. Yet, the Court of Appeals undertook no discussion of how such a secondary effects assertion justified enactment of the

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[43] It should also be noted that in *Jameson*, this Court did not conduct an analysis under the Kentucky Constitution.

particular restrictions contained in Chapter 111, or whether the Ordinance provisions satisfied the "narrowly tailored" prong of *Alameda Books*, or satisfied Justice Kennedy's "how speech would fare" test. As discussed above, Justice Kennedy stressed that a constitutional analysis directed at these types of regulations ***must*** "address how speech will fare under the city's ordinance." *Id.* at 450.

The Plaintiffs should have been afforded the opportunity to actually place all of their secondary effects evidence before the circuit court which - - as evidenced even by the Court of Appeals' recitation of the circuit court record - - it is clear they were denied. The circuit court should have not granted full summary judgment on the case until a later date when all discovery had been taken, evidence from both parties had been submitted, and the issue fully litigated. Indeed, this Court has acknowledged that "evidence of the occurrence, or non-occurrence, of the feared secondary effects will bear on the reasonableness of the legislative belief for the need of such regulation." *Jameson*, 215 S.W.3d at 32. Obviously, this Court believes that a secondary effects challenge can be mounted and that actual evidence is necessary to resolve that challenge. Plaintiffs simply ask that they be afforded the opportunity to fully develop that evidentiary record and have it fully considered by the circuit court.

If Plaintiffs were to have successfully challenged the secondary effects justification for the enactment of Chapter 111 at trial under *Pap's II* and *Alameda Books*, the entire ordinance would be ***invalid***. *See, e.g.*, *Alameda Books*, 535 U.S. at 439. Given the record originally submitted by the Plaintiffs below, and more

importantly the lower court's subsequent cleansing thereof, it was improper to dismiss Plaintiffs' entire lawsuit without affording them the opportunity to litigate their claim that Metro did not have a sufficient evidentiary basis to enact Chapter 111. The Court of Appeals was further in error in not reversing this decision and in its analysis of the secondary effects jurisprudence as applied to this case.

V. THE CIRCUIT COURT SHOULD HAVE ENTERED A TEMPORARY INJUNCTION AND SHOULD NOT HAVE LIFTED THE RESTRAINING ORDER.

For the same reasons that a reversal of the partial grant of summary judgment is warranted, the denial of Plaintiffs' motion for temporary injunction also warrants reversal as an injunction was necessary to prevent any further irreparable harm to Plaintiffs' freedom of expression rights. The Court of Appeals erred in not reversing these decisions. Plaintiffs established the elements required for a temporary injunction pursuant to CR 65.04: (1) Plaintiff showed a probability of irreparable injury; (2) the public interest will be harmed, or the injunction will merely be to maintain the status quo; and, (3) a substantial question was presented. *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978).

Plaintiffs clearly showed a probability of irreparable injury as they were being, and would continue to be, deprived of their right to free expression under the Kentucky Constitution if an injunction was not issued. Any infringement of expressive rights, for even minimal periods of time, constitutes irreparable harm under the federal

constitution, *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and nothing is different under the State Constitution. *James*, 63 S.W.3d at 605 ("Restraining free speech constitutes immediate and irreparable harm, if unauthorized"). The public interest would not have been harmed by an injunction as "it is always in the public interest to prevent the violation of a party's constitutional rights." *G&V Lounge, Inc.*, 23 F.3d at 1079. In addition, the injunction would merely have preserved the status quo. Finally, Plaintiffs presented substantial questions on the merits of their challenges, as is demonstrated by the briefing herein.

VI. THE PRINCIPAL OWNER DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL.

The Court of Appeals erred by overturning the ruling of the circuit court that § 111.36(A), which requires a mere 20% shareholder and corporate directors to undergo the entire licensing process contained in Chapter 111 (*See* §§ 111.36, 111.02, and 111.36 (B)(2)(b)),[44] is unconstitutional. Apx. A, pp. 79-84.

Regulations compelling disclosures in order to be able to engage in constitutionally protected activities violate the First and Fourteenth Amendments and the

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[44] These persons would therefore be required to disclose their name, mailing address, date of birth, and a copy of a government-issued photo identification card or set of fingerprints, § 111.36(B)(2), and to disclose all convictions for "specified criminal activities as defined in this Chapter . . . ." § 111.36(B)(6).

rights of privacy related thereto,[45] as well as the corollary, and more expansive, protections contained in the Kentucky Constitution (Ky. Const §§ 1,2,8,14,and 26). The federal precedent on this issue stands for the proposition that persons are entitled to engage in protected conduct, especially that which is controversial, without the public disclosure of their connection to such activities. There is a fundamental right to anonymously associate for the purpose of engaging in First Amendment activities. *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 357 (1995); and *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 167 (2002) ("The fact that circulators revealed their physical identities did not foreclose our consideration of the circulators' interest in maintaining their anonymity"). *See also* cases set forth in n.45, *supra*. Ownership of, and association with, "First Amendment" protected businesses clearly fall within this zone of privacy.

For example, in *Ellwest*, the court dealt with disclosure requirements for partners and shareholders that were similar to the provisions here. The only significant difference is that here, § 111.36(A) calls for information disclosure of any and all owners having a 20% interest, *regardless of their involvement with the*

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[45] *See, e.g., Buckley*, 424 U.S. at 64; *Talley v. California*, 362 U.S. 60, 64 (1960); *N.A.A.C.P. v. Alabama ex rel Patterson*, 357 U.S. 449, 461-62 (1958); *Genusa v. City of Peoria*, 619 F.2d 1203, 1215-17 & n.33 (7th Cir. 1980); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 226 (6th Cir. 1995); *TK's Video, Inc. v. Denton County, Tx.*, 24 F.3d 705, 709-10 (5th Cir. 1994); *Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219, 224-26 (9th Cir. 1989); *T-Marc, Inc. v. Pinellas County, Fla.*, 804 F.Supp. 1500, 1505-06 (M.D. Fla. 1992); and *Ellwest*, 718 F.Supp. at1564-70.

operation of the establishment, while the similar provision in *Ellwest* compelled disclosure of shareholders holding five percent or more of the stock of a corporate applicant. *Ellwest*, 718 F.Supp. at 1564. This distinction is without constitutional significance. The District Court in *Ellwest* observed that:

> Persons who solely have ownership interests in adult-oriented establishments, such as limited partners and shareholders, have no responsibility for the day-to-day operations of the business and, therefore, are not charged with operating such establishments in accordance with the ordinance. . . . Other courts have also consistently struck down disclosure provisions relating to stockholders and persons having only a financial interest in a business on the basis that there is insufficient necessity on the part of the government to justify such intrusion into fundamental First Amendment rights.

Id. at 1565.[46]

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[46] *See also Genusa*, 619 F.2d at 1217 (the Seventh Circuit striking down disclosure requirements for individual *officers, directors, and shareholders* as an "unjustified prior restraint and an invasion of privacy"); *Pentco, Inc. v. Moody*, 474 F.Supp. 1001 (S.D. Ohio 1978) (court invalidating similar disclosure provisions for partners and shareholders holding ten percent or more of the stock of a corporate applicant, on the basis that such individuals were not involved in the day-to-day management of the business); *East Brooks Books*, 48 F.3d at 226 (the Sixth Circuit invalidating an ordinance requiring disclosure of all stockholders' names); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1366-67 (11th Cir. 1999) (court striking down ***all*** stockholder disclosure requirements); and *Buckley*, 424 U.S. at 64 (Court held that

The Court of Appeals ignored these precedents when holding that the trial court erred in finding that the challenged disclosure of 20% owners was not *de minimus*, without considering "the purpose for which the provisions was enacted," and whether "there exists a substantial relation to the stated governmental interest." (Apx. A, p. 80-81, 84).

The Court of Appeals held that the circuit court did not "make a proper evaluation under *O'Brien's* fourth prong: whether the incidental restriction on alleged free speech or expression is no greater than essential to the furtherance of that interest." Apx. A, p. 80. The circuit court made a proper analysis (Apx. C, pp. 10), holding that requiring a 20% shareholder, who would have little or no responsibility for the day to day operation of a business is greater than essential to the furtherance of Metro's interest. Apx. A, p. 80.

Further, the Court of Appeals goes to great lengths to point to cases in which similar disclosure provisions were invalidated, contending that because the various interests those municipalities sought to further differ from some of Metro's interests, Chapter 111's shareholder disclosure provisions are valid. Apx. A, pp. 80-83. Because one of Metro's purported interests sought to be furthered was to monitor the involvement of organized crime in the adult entertainment industry, the Court of Appeals felt that it was permissible to require more than the *de minimus* disclosures. Apx. A, pp. 83-84. However, one of the

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"compelled disclosure, in itself, can seriously infringe on the privacy of association and belief guaranteed by the First Amendment").

cited cases in that opinion supports the circuit court's invalidation of this provision: "Shareholders are not ultimately responsible for the day-to-day operation of the business and therefore would have no control over the conditions at the adult establishments." Apx. A, p. 82. Further, the Court of Appeals cites to *Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989), noting that the court there held "that officers and directors, not shareholders, were legally responsible for the management of a corporation's business." Apx. A, p. 82. Regardless of the fact that one of Chapter 111's purported governmental interests is the involvement of "organized crime," the required disclosure of individuals who have no legal responsibility for the management of an adult establishment does not satisfy the fourth prong of *O'Brien*, and the Court of Appeals erred in reversing.

Additionally, the Court of Appeals failed to address the issue that requiring such disclosures ***to the government*** as a condition for engaging in constitutionally protected expression is impermissible. These compelled disclosures further evidence the unconstitutional nature of the criminal disability provisions in that "principal shareholders" can be denied licensing where that individual has absolutely no management, control, or operational oversight of the day-to-day management of the business. This why other courts have invalidated these type of "shareholder" disclosure requirements.

VII. THE "NO-TOUCH" PROVISION OF CHAPTER 111 IS UNCONSTITUTIONAL.

The "no touch" provision in § 111.35(D) is unconstitutional for numerous reasons, as held by the

trial court. First, it must be noted that the "no touch" provision ***does not*** apply merely when the entertainer is "semi-nude," as is the case of the buffer zone and the "no payment" provisions. Basically, if a dancer "regularly" (whatever that may mean) appears "semi-nude in an adult entertainment establishment," she cannot "touch a customer or the clothing of a customer" *irrespective of how she is dressed, or whether or not she is even performing*. She cannot, for example, shake the hand of a customer even though she is fully dressed in a nightgown and sitting in a chair. Such purely innocent conduct can result *in fines, double fines, imprisonment and loss of license to engage in future expressive activities*. §§ 111.43 and 111.99.

This provision is constitutionally impermissible and the trial court agreed "with Plaintiffs that the sweep of subsection (D) is overbroad in that its reach prohibits ***otherwise legal*** and expressive touching such as a handshake between a patron and a dancer who is fully clothed and not performing at the time." R. Vol. VII, p. 959; Apx. C, p. 17 (emphasis added). The Court of Appeals disagreed, finding that "touching between a performer and a customer is not protected expression," and reversed the circuit court on this issue. Apx. A, pp. 86-87. Of course the Court of Appeals cited to not one Kentucky court supporting this holding, and ignores both the freedom of association and liberty rights involved.

A law is overbroad if, in its reach, it prohibits constitutionally protected conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). Here, the statutory provision at issue certainly criminalizes and proscribes

innocent conduct that is not otherwise illegal; *i.e.*, non-sexual touching.[47]

Before moving past this point, however, one further comment is in order. Plaintiffs are ***not*** seeking a ruling that would permit any type of illicit touching. Metro can certainly proscribe impermissible sexual touching between individuals in an adult establishment, or elsewhere. That is not, however, the approach which Metro decided to take, and instead enacted a draconian provision which prohibits any innocent physical interaction between certain individuals at any time.

Second, and in this regard, the no touch provision *is not limited to conduct occurring within an "adult entertainment establishment."* As long as an entertainer "regularly" appears semi-nude in an adult entertainment establishment, she cannot ***ever*** "touch a customer or the clothing of a customer," according to the plain terms of the Ordinance.[48] Pursuant to the

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[47] The proscriptions as contained in § 111.35(D) should therefore be contrasted with another "no-touch" provision evaluated by a federal district court in *J.L. Spoons, Inc. v. City of Brunswick*, 49 F.Supp.2d 1032, 1046-47 (N.D. Ohio 1999), where that court upheld a no touch provision because it had a "scienter element" that allowed "inadvertent and non-sexual contact," and that permitted contact when a dancer had on more than pasties and a g-string. *Id.* at 1046-1047. None of these limitations apply here, thereby rendering these provisions overbroad and unconstitutional as found by the circuit court.

[48] This, again, should be contrasted with the buffer zone and "no payment" provisions, which facially only apply when an entertainer is semi-nude ***and*** in an adult entertainment establishment. §§ 111.35(B) and (C).

canons of statutory construction, the textual difference between this provision and the buffer zone and "no payment" sections (*see* n.51, *supra*) must be considered intentional and of interpretational significance, and should not be ignored by the lower courts or this Court.

Certainly, it is clear that any law which precludes persons from shaking hands at any time and in any place is overbroad for the reasons set forth above. Nevertheless, the Court of Appeals contends that the trial court was obliged to interpret § 111.35(D) by applying a narrower construction that would thus uphold the constitutional validity of the Ordinance by causing it to apply only to dancers within an adult entertainment establishment. Apx. A, pp. 85-86. However, there are numerous reasons why such a contention is misplaced. First, such a limiting construction would not save § 111.35(D) from constitutional invalidation. In fact, the circuit court first found this provision infirm because it "prohibits otherwise legal and expressive touching such as a handshake between a patron and a dancer who is fully clothed and not performing at the time." R. Vol. VII, p. 959; Apx. C, p. 17. Consequently, because the Court of Appeals' limiting construction does not address the primary reason why the circuit court found this provision constitutionally infirm, reversal based upon the limiting construction was in error.

Second, as stated above, because this provision is specifically written in a fashion so that it is ***not*** limited to conduct occurring in an adult entertainment establishment - - as acknowledged by the Court of Appeals (Apx. A, p. 85) - - whereas other proscriptions found in the Ordinance contain specific language

limiting the reach of those proscriptions to conduct occurring inside such businesses (the buffer zone and "no payment" provisions), this Court cannot ignore this intentional textual difference. To apply the Court of Appeals' limiting construction, this Court would have to directly ignore ***intentional*** textual differences which the Metropolitan council placed into the Ordinance.

Third, the Court of Appeals failed to take into account that although courts are obliged to give "if possible, an interpretation which upholds [a statute's] constitutional validity," *American Trucking Assoc. v. Commonwealth of Kentucky Transportation Cabinet*, 676 S.W.2d 785, 789 (Ky. 1984), "the courts are not at liberty to supply words or insert something or make additions which amount, as sometimes stated, to providing for a *casus omissus,* or cure an omission, however just or desirable it might be to supply an omitted provision." *Hatchett v. City of Glasgow*, 340 S.W.2d 248, 251 (Ky. Ct. App. 1960) (emphasis in original). In providing a statutory construction, the courts may only "supply clerical or grammatical omissions in obscure phrases or language of a statute in order to give effect to the intention of the Legislature, presumed or ascertainable from the context. . . ." *Id.* The Court of Appeals either overlooked or chose to ignore these restraints upon judicial interpretation, and held that the trial court failed to re-write the Ordinance in order to avoid what the appellate court calls a "hypothetical constitutional clash." Apx. A, p. 86. The trial court, however, acted properly in refusing to act as the legislative branch of Metro Government.

Finally, this provision violates both the Freedom of Association Clause of the Kentucky Constitution, as well as the liberty rights found in the Due Process Clause as discussed in Section III above. The protection of liberty emanates from Ky. Const. §§ 1 and 11. The federal corollary to these provisions is found in the Fourteenth Amendment.[49] *See Lawrence*, 539 U.S. at 565 (Court "confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person").[50] The liberty rights afforded under the Kentucky Constitution are no less. By effectively prohibiting entertainers from even shaking the hand of a patron while fully clothed, Metro has unquestionably deprived entertainers of their right to liberty protected by Ky. Const. §§ 1 and 11, not to mention their right to freely associate.

Suffice it to say that citizens of the Commonwealth of Kentucky have the right to associate for lawful purposes (including a husband being able to simply hold his wife's hand), and the freedom of liberty "presumes an autonomy of self. . . ." *Lawrence*, 539

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[49] *See, e.g., Allgeyer*,165 U.S. at 589 ("'liberty' mentioned in [the Fourteenth A]mendment means, not only the right of the citizen to be free from the mere physical restraint of his person . . . but the term is deemed to embrace the right of the citizen to be free . . . ***to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation***") (emphasis and clarification added).

[50] In addition, what may textually be implied in the Federal Constitution is explicit in the Constitution of the Commonwealth of Kentucky. "All men . . . have certain inalienable rights, among which . . . [is] . . . the right of enjoying and defending their lives and liberties." Ky. Const. § 1.

U.S. at 562. Even the federal Due Process Clause extends protection of the right to associate with others. *See City of Chicago v. Morales*, 527 U.S. 41, 54 n.19 (1999). Short of conduct arising to a "harmful purpose," the right of persons to touch one-another in a non-unlawful manner cannot be precluded. *Id.* at 62. The Court of Appeals, of course, ignores this aspect of the unconstitutionality of this provision, arguing that the touching at issue here is "not protected expression[51]" therefore disagreeing "with the circuit court that the no-touch provision is overbroad." Apx. A, p. 87. These comments, while wrong in-and-of-themselves, say nothing about the liberty and associational rights at issue here.

CONCLUSION

Plaintiffs respectfully request this Honorable Court to reverse the ruling of the Court of Appeals. In addition, this Court should either hold Chapter 111 to be infirm under the Kentucky Constitution, or remand for full consideration of Plaintiffs' claims.

Dated: June 24, 2008

Respectfully Submitted,

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[51] Touching can be expressive, particularly here where it may occur in the context of an entertainment performance being undertaken by a particular dancer for a specific patron.

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